STATUTES

Federal Statutes

Miscellaneous

Nos. 117, 118, 119, 332, 333 and 334

Supreme Court of the United States

OCTOBER TERM, 1955

No. 117

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, Appellant,

vs.

UNION PACIFIC RAILROAD COMPANY, ET AL.

No. 118

UNION PACIFIC RAILROAD COMPANY, ET AL., Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

No. 119

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND SECRETARY OF AGRICULTURE, Appellants,

vs.

THE UNION PACIFIC RAILROAD COMPANY, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

No. 332

WASHINGTON PUBLIC SERVICE COMMISSION, PUBLIC UTILITIES COMMISSIONER OF OREGON, ET AL., Appellants,

vs.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, ET AL.

No. 333

UNION PACIFIC RAILROAD COMPANY, CHICAGO AND NORTH WESTERN RAILWAY COMPANY, ET AL., Appellants,

vs.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, ET AL.

No. 334

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, Appellants,

vs.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

CONSOLIDATED REPLY BRIEF OF THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

PRELIMINARY RESTATEMENT OF THE POSITION OF THE PARTIES

By way of conforming to the spirit of the order of consolidation of this Court entered October 24, 1955, The Denver and Rio Grande Western Railroad Company (hereinafter sometimes called "the Rio Grande") duly filed its Consolidated Opening Brief covering the above-entitled series of appeals.

Appeals Nos. 117, 118 and 119 are from the United States District Court for the District of Nebraska.

Appeals Nos. 332, 333 and 334 are from the United States District Court for the District of Colorado.

These appeals deal with various aspects of a Report and Order of the Interstate Commerce Commission dated January 12, 1953, which upon complaint of the Rio Grande, supported by interested shippers, accorded relief to the Rio Grande and to the interested shippers with respect to through routes and joint rates as to certain named commodities. The Commission Order denied relief with respect to all other commodities, shipped to and from what is known as the "closed door" territory in northern Utah, Idaho, Montana, Washington and Oregon—as to which territory the Union Pacific Railroad Company claims the right to control the movement of all railroad freight traffic, to prefer certain of its favored railroad connections, and to exclude the Rio Grande from all such traffic moving to and from that area unless the shippers (the public) are willing to pay a higher price.

The position of the Rio Grande and its interveners, as set forth in its Consolidated Opening Brief, is that the

Colorado decision should be affirmed and the case remanded to the Commission with instructions that through routes via the Ogden gateway are in existence and that the Rio Grande is entitled to have the case considered and decided by the Commission, free of the limitations of Section 15(4) of the Interstate Commerce Act; that the Nebraska court should be reversed and the Commission's Order reversed in so far as it denies the relief prayed for by the Rio Grande; that in the alternative, in the event that the Colorado court is not affirmed, this Court should reverse the Nebraska decision and affirm the Commission Order.

The United States of America, the Interstate Commerce Commission and the Secretary of Agriculture (hereinafter sometimes called "the Government") also in conformity to the spirit of the order of consolidation, filed a Consolidated Opening Brief dealing with the issues in all of the above-entitled appeals. In that brief the above named appellants seek a reversal of the Colorado decision, a reversal of the Nebraska decision, and a restoration of the Commission Order of January 12, 1953. (It should be noted, however, that the Secretary of Agriculture is not a party to the appeal from the Colorado court—see Government brief, footnote 1, page 2.)

In Case No. 118 the Union Pacific Railroad Company, *et al.* (hereinafter sometimes called "the Union Pacific"), filed a separate opening brief seeking a reversal of the Nebraska decision and a reversal of the Commission Order; the Union Pacific also filed a sep-

arate opening brief in Case No. 333 seeking a reversal of the Colorado decision.

The Washington Public Service Commission, *et al.*, filed a separate opening brief in Case No. 118, joining the Union Pacific in seeking a reversal of the Nebraska decision, and filed a separate opening brief in Case No. 332 supporting the position taken by the Union Pacific with respect to reversal of the Colorado decision and a reversal of the Commission Order. The arguments made and the authorities cited in the brief of the Washington Public Service Commission, *et al.*, are so nearly identical with those set forth in the Union Pacific brief that they do not require any separate answer.

ADDITIONAL STATUTES INVOLVED

Due to the arguments advanced by the Union Pacific in its opening briefs, these appeals now involve the following additional statutes:

Title 28, United States Code, Sections 1336 (62 Stat. 931) and 1398 (62 Stat. 936), set forth verbatim in Appendix A hereto.

The Interstate Commerce Act, 24 Stat. 379, as amended, Title 49 U.S.C., part of Section 1(3)(a) and Sections 15(7), 17(3) and 20(11), set forth verbatim in Appendix A hereto.

COLORADO DECISION

Appeals Nos. 332, 333, 334

REVIVAL OF PROCEDURAL QUESTIONS HERETOFORE ARGUED

The Union Pacific in its opening brief on appeal from the Colorado court first revives and reargues certain procedural questions heretofore fully argued to this Court in special briefs filed in connection with a Union Pacific motion for summary reversal of the Colorado decision made and presented to this Court before probable jurisdiction was noted in these appeals. The Rio Grande at page 34 of its Consolidated Opening Brief referred to these procedural contentions of the Union Pacific as having been inferentially denied when this Court noted probable jurisdiction. These procedural questions (based upon motions originally made by the Union Pacific in the Colorado court but by no other litigant) will first be analyzed and answered before dealing with the substantive issues in the Colorado case.

ANSWER TO PROCEDURAL QUESTIONS AGAIN RAISED BY THE UNION PACIFIC

I.

The Colorado Court Had Jurisdiction to Set Aside the Order of the Commission

Section 1336 of Title 28, U.S.C. (62 Stat. 931), reads as follows:

> "Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul

or suspend, in whole or in part, any order of the Interstate Commerce Commission."

The proper forum for maintaining this action authorized by Section 1336 is prescribed by Section 1398 of Title 28, U.S.C. (62 Stat. 936), which provides:

> "Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action."

The principal office of the Rio Grande is situated in Denver, Colorado, in the District of Colorado. Accordingly, the United States District Court for the District of Colorado is the only proper judicial district in which the Rio Grande could institute an action to review the Commission's Order of January 12, 1953.

The Union Pacific asserts that the Colorado court erred in failing to dismiss the Rio Grande complaint because the matters complained of therein did not involve a Commission order or part of an order. In support of this contention the Union Pacific chiefly relies on *United States v. Atlanta, B. & C. R. R.*, 282 U.S. 522. The facts in that case are distinguishable from those in the instant case. That case involved a complicated accounting situation growing out of the receivership and reorganization of the Atlanta, Birmingham and Atlantic Railway Company, 117 I.C.C. 181 (supplemental report of the Commission in the same case 117 I.C.C. 439). The order of the Commission authorized the new company to issue preferred and common stock and imposed certain conditions with respect

to the accounting classification of "investment in road and equipment." When the new company set up its books it did not comply with those conditions. As a result of a further hearing and reconsideration of the questions involved, the Commission issued its report in *Atlanta, B. & A. Ry. Reorganization,* 158 I.C.C. 6, 13, 14, in which it stated the value of the property of the railroad for rate making purposes and prescribed accounting rules and regulations but entered no formal order whatsoever. The concluding paragraph of the last decision reads as follows:

> "Upon consideration of the record, as supplemented, we find and conclude that the amount to be included in the balance sheet statement of the new company representing investment in road and equipment as of January 1, 1927, may not exceed $9,216,043.87. The company will be expected to adjust its accounts in accordance with this finding within 60 days from service of this report."

It will be seen that the Commission merely stated that the company "will be expected" to adjust its accounts in accordance with the Commission's finding within 60 days from the service of its report. The finding there was neither in the form of an order nor did it purport to be a part of any order.

That decision should be compared with the recent decision of the Court in *Henderson v. United States,* 339 U.S. 816, which reversed with directions to remand the decision of the court below that sustained the decision of the Commission in *Henderson v. Southern Ry.,* 269 I.C.C. 73, 78, wherein the Commission found that under the revised rules of the Southern Railway, Hen-

derson had not been subjected to unreasonable prejudice and disadvantage. The Commission did not enter any order for the future. It merely dismissed the complaint. In that case the United States by brief and oral argument supported the appellant on the ground that it was clear that he had standing to institute the suit and to bring the proceedings, since he was an aggrieved party, free to travel again on the Southern Railway. This Court sustained that view, overruled the Commission by finding that Henderson was subject to undue prejudice in violation of Section 3 of the Interstate Commerce Act and remanded the case with directions. It will thus be seen that in the *Henderson* case this Court considered a decision of the Commission on which no order for the future had been entered, despite the earlier decision of the Court in the *Atlanta, B. & C. R. R.* case, 282 U.S. 522.

There is attached as Appendix A to the Rio Grande's Consolidated Opening Brief a copy of the Order of the Commission of January 12, 1953, in this case. It will be observed that the first paragraph of the Order specifically states that the Report containing the Findings of Fact and Conclusions of the Commission "is hereby referred to and made a part hereof; * * *." No such order was made in the *Atlanta B. & C. R. R.* case relied upon by the Union Pacific. This fact in itself renders that case wholly inapplicable here.

The Union Pacific in its brief stresses the fact that the Order of the Commission did not use the word "dismissed" in connection with its failure to find through routes and competitive joint rates on the commodities

involved in the litigation other than the limited number of commodities named in the Order. But the failure to use the actual word "dismissed" is of no significance since as was pointed out in the *Rochester Telephone* case, 307 U.S. 125 at page 142:

> "The nature of the issues foreclosed by the Commission's action and the nature of the issues left open, so far as the reviewing power of courts is concerned, are the same."

The discussion of this general question by Mr. Justice Frankfurter at page 142 and other pages of the *Rochester Telephone* case is a complete answer to the contentions of the Union Pacific that that part of the decision of the Commission which denied the relief sought by the Rio Grande and which is involved in the instant appeal is not an order and therefore is not subject to review by this or any other court. The Commission in its Conclusions (which were expressly made a part of its Order) distinctly stated "That except as indicated in the preceding findings, the allegations made in the complaint are not sustained." This was the legal equivalent of a dismissal of these allegations.

The Union Pacific also relies to a large extent upon the so-called negative order doctrine of *Standard Oil Co. v. United States,* 283 U.S. 235, to support its position. In *United States v. ICC,* 337 U.S.426, 436, after referring to the negative order doctrine and to the *Standard Oil* case, the Court made the statement:

> "This doctrine was wholly abandoned in *Rochester Tel. Corp. v. United States,* 307 U.S. 125."

Another decision relied on by the Union Pacific is *Manufacturers Ry. v. United States,* 246 U.S. 457, a

decision based upon the now repudiated doctrine that only affirmative orders of the Commission are reviewable. The facts of that case are so different from the facts in the instant case as to make it wholly inapplicable. In *Manufacturers Ry. v. United States,* a failure by the Commission "to fix divisions" was held not to be subject to judicial review because it only involved a failure or refusal of the Commission to exercise its administrative authority. In the instant case the Commission exercised its administrative authority by granting the Rio Grande limited relief under Section 15(4) of the Interstate Commerce Act, but by reason of an erroneous interpretation of the law denied relief in all other respects.

It should be pointed out that both the *Atlanta B. & C. R. R.* case and the *Manufacturers Ry.* case above referred to, and so heavily relied upon by the Union Pacific, were decided prior to the *Rochester Telephone* case, and the *Henderson* case.

All of the foregoing cases were referred to and relied upon by the Union Pacific in its Statement and Argument on its Motion to Reverse filed in this Court prior to the noting of probable jurisdiction and were undoubtedly fully considered by this Court at that time.

The only additional case of consequence now relied upon by the Union Pacific is *Brady v. ICC,* 43 F.2d 847 (N.D.W.Va.), aff'd *per curiam* 283 U.S. 804. The legal situation and the facts in the *Brady* case are clearly distinguishable from those in the instant case. The *Brady* case involved a suit brought to set aside a reparation order, of no interest to the public at large, in which

it was sought to review in the courts the amount of damages allowed by the Commission, and thereby to secure a larger money judgment. There was no allegation there as to any basic error of law on the part of the Commission, or showing of irreparable injury to the complainant. A mere matter of dispute over the adequacy of damages has no analogy to a situation where basic issues of law are involved as alleged in the Rio Grande's complaint in the Colorado court.

There never has been any doubt but that where an issue as to the existence of through routes is involved, a court may examine into the matter and decide upon the whole record whether through routes are in existence as a matter of law. *Thompson v. United States,* 343 U.S. 549; *ICC v. Northern Pacific Ry.,* 216 U.S. 538.

The action of the Commission in failing to find that through routes are in existence via the Ogden gateway over the Rio Grande resulted in its making and entering an erroneous Order. When the Rio Grande, in its complaint in the Colorado court, assailed this Order as erroneous, that court had jurisdiction to hear and determine the matter.

II.

The Rio Grande Had Standing to Bring Suit to Set Aside the Order of the Commission

Procedural question II raised by the Union Pacific is based on the contention that the Rio Grande had no legal right or standing to maintain its suit in the Colorado court. In this connection, the Union Pacific harks back to the Rio Grande complaint before the Commission and erroneously attempts to make it ap-

pear that this complaint was filed for the sole purpose of improving the Rio Grande's financial position and securing pecuniary gain at the expense of the Union Pacific. To further distort this erroneous charge, the Union Pacific uses extravagant and theoretical figures regarding what the loss to the Union Pacific and the gain to the Rio Grande might be if the Rio Grande should prevail in its contentions. Any proceeding successfully maintained by one railroad against another to correct allegedly unjust, unreasonable, discriminatory or prejudicial rates inevitably results in some shift in pecuniary advantage.

The Rio Grande complaint before the Commission was based upon the relevant provisions of the Interstate Commerce Act which govern and require all railroads, even including the Union Pacific, to charge just, reasonable, non-prejudicial, and non-discriminatory rates over existing through routes. It was not, as the Union Pacific persistently contends, based upon the idea of the Rio Grande trying to deprive the Union Pacific of traffic to which the Union Pacific claims an inherent right. No railroad has an inherent right to traffic. The shipper alone has the right to determine how traffic shall flow over existing through routes (see Section 15(8)).

Actually, what the Union Pacific is attempting in connection with the denial by the lower court of its motion to dismiss is to bring in, as a part of its procedural attack, the language of Section 15(4) requiring the Commission in prescribing new through routes to "give reasonable preference to the carrier by railroad which originates the traffic" and providing that

"No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs." Section 15(4) and its applicability to the facts in the instant case are not properly involved in the procedural issues raised by the Union Pacific in the Colorado case, because the Rio Grande complaint in that case was not based upon the contention that new through routes should be established under that section, but rather upon the contrary proposition that through routes are already in existence.

It is important to point out that the Union Pacific from the beginning has attempted to force the Rio Grande to justify its standing to maintain its action by contending that the standing of the Rio Grande to sue in the Colorado case must be grounded on Section 15(4) with its restrictive provisions, and thus to defeat the complaint of the Rio Grande on that ground. But the Union Pacific is unable to argue that the limitations of Section 15(4) are applicable where through routes are already in existence as alleged by the Rio Grande in the Colorado case. The Union Pacific attempted to make such a contention, however, and in so doing has tried to obscure the real contention of the Rio Grande in the Colorado case, to-wit, that Section 15(4) is inapplicable in a case where through routes are already in existence. Having thus based its whole procedural attack on Section 15(4), the Union Pacific's entire argument as to the Rio Grande's standing to sue must fall. It is clear that the restrictive provisions of Section 15(4) cannot be successfully used to support the Union

Pacific motion to dismiss when the standing of the Rio Grande as shown by its complaint is chiefly based upon alleged violations of various provisions of the Interstate Commerce Act (other than 15(4)). The substance of these sections for convenience is set forth as follows:

Section 13(1) of the Interstate Commerce Act affirmatively provides that any person, firm, corporation, company, or association, *or any common carrier*, may file a complaint with the Commission against anything done or omitted to be done by any other common carrier subject to the provisions of the Act in violation of such provisions. (Thus the Rio Grande, as a common carrier, had the statutory right to complain against the Union Pacific and the other defendants for their violations of the provisions of the Interstate Commerce Act.)

Section 1(4) of the Act requires every common carrier railroad to furnish transportation upon reasonable request and to establish just and reasonable through rates, fares, charges and classifications.

Section 1(5) states that:

> "All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

Section 3(1) makes it unlawful for any common carrier subject to the Act

> "to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association,

locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

Section 3(4) provides:

"All carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, * * * ."

The cited provisions of the Interstate Commerce Act impose duties upon common carriers by railroad subject to that Act. The authority of the Commission to enforce obedience to those duties is found principally in Sections 13 and 15 of the Act. These sections confer the right to complain where railroads such as the Union Pacific and its preferred connections fail and refuse to comply with their statutory duties.

It, therefore, follows that where, as here, it is claimed by the Rio Grande that the Union Pacific violates the Interstate Commerce Act by its failure and refusal to

participate with the Rio Grande in the maintenance of reasonable and non-discriminatory joint rates, rules and regulations with respect to the operation of through routes and has failed and refused to accord reasonable, proper and equal treatment in the matter of rates and the interchange of traffic, such a complaint is grounded on the provisions of the Interstate Commerce Act, which confer statutory rights upon the Rio Grande for the violation of which the Rio Grande has a right to complain.

In addition to the decision in the *Rochester Telephone* case, there are numerous other decisions of this Court which support the standing of the Rio Grande to maintain this suit. In *Youngstown Sheet & Tube Co. v. United States,* 295 U.S. 476, 479, contentions similar to those made here by the Union Pacific were rejected by the Court, as follows:

> "The appellants were entitled to bring and maintain this suit to set aside the order. They were parties to the proceeding before the Commission, had a pecuniary interest in the rates and were affected by the order. The authorities cited by the appellees are to be distinguished on the ground that the plaintiffs either had no legal interest or capacity to sue or failed to allege that the rates under attack were unreasonable or discriminated against them."

The court below had jurisdiction to review the order of the Commission under 28 U.S.C., Sections 1336 (62 Stat. 931) and 1398 (62 Stat. 936). The complaint of the Rio Grande in the Colorado court alleged that it not only has a pecuniary interest in the issues raised, but that the Order, unless remanded to the Commission for correction of errors, would cause the Rio Grande irre-

parable injury in that the alleged unjust, unreasonable and unjustly discriminatory rates, routes and practices of the Union Pacific would be perpetuated by the Commission's erroneous Order and Conclusions and would violate the statutory right of the Rio Grande to participate on equal terms in the revenues from through traffic at competitive joint rates over through routes under the provisions of the Interstate Commerce Act. These allegations are amply sufficient to sustain the Rio Grande's standing to sue in the Colorado court. The fact that the part of the Order of the Commission involved in the Colorado case is negative in form does not bar the right of the Rio Grande to maintain the suit.

In *Mitchell v. United States*, 313 U.S. 80, this Court considered the decision and order of the Commission in *Mitchell v. Chicago, R. I. & P. Ry.*, 229 I.C.C. 703, in which the Commission held that the treatment accorded Mitchell by the railroads which he claimed was unjustly discriminatory was neither that nor unduly prejudicial under the provisions of the Interstate Commerce Act. This Court did not hesitate to overrule the Commission and hold that the treatment accorded Mitchell was unjustly discriminatory and unduly prejudicial under the provisions of the Interstate Commerce Act. It clearly based its reversal on that ground and not on the constitutional ground mentioned in the decision. At page 93 of the opinion, the Court said:

> "He [Mitchell] presents the question whether the Act does forbid the conduct of which he complained."

See also *Henderson v. United States*, 339 U.S. 816. In *The Chicago Junction Case*, 264 U.S. 258, which

dealt with an order of the Commission that authorized, but did not require, the New York Central to purchase control of the Chicago Junction Railway, the Court sustained the right of the Pennsylvania Railroad, the Baltimore & Ohio, and other competitors of the New York Central to maintain a suit to set aside the order of the Commission. It was there claimed by the defendants that the plaintiffs, as competitors, did not have a sufficient legal interest to permit them to bring or to maintain the suit. In that case the Court was moved in part by the consideration that the plaintiff railroads would lose large sums of money by virtue of the control of the Chicago Junction by the New York Central. They were parties to the proceeding before the Commission and thereby acquired the right to sue, and also had such a right under Section 212 of the Judicial Code (28 U.S.C., Section 41(27) note). The Court stated, 264 U.S., at page 267, apropos of the large loss sustained by the railroad plaintiffs:

> "This loss is not the incident of more effective competition. Compare *Edward Hines Trustees v. United States,* 263 U.S. 143, 148. It is injury inflicted by denying to the plaintiffs equality of treatment. To such treatment carriers are, under the Interstate Commerce Act, as fully entitled as any shipper. *Pennsylvania Co. v. United States,* 236 U.S. 351."

The right of the Rio Grande to bring and to maintain the instant suit in the court below under the Interstate Commerce Act is also sustained by *United States v. ICC,* 337 U.S. 426, 435; *Barrett Line, Inc. v. United States,* 326 U.S. 179; *American Trucking Ass'ns v.*

United States, 326 U.S. 77; *ICC v. Parker,* 326 U.S. 60; *Alton R. R. v. United States,* 287 U.S. 229; *United States v. New River Co.,* 265 U.S. 533; *Skinner & Eddy Corp. v. United States,* 249 U.S. 557, and the revealing and comprehensive opinion by Judge Parker in *Anchor Coal Co. v. United States,* 25 F.2d 462 (S.D. W. Va.)

See also article by Kenneth Culp Davis in 49 Columbia Law Review 759-795 (1949), where at pages 772-73 he states:

> "In none of the Supreme Court decisions denying standing under the Interstate Commerce Act was the petitioner a carrier. Even a mere competitive interest of a carrier is sufficient for enforcing the Act or for challenging action of the Commission."

The Union Pacific in arguing its procedural point II refers to the Colorado decision as stating that the Commission's failure to grant the Rio Grande's demands "caused no pecuniary loss to the Rio Grande." This quotation is taken out of context and overlooks the fuller statement of the Colorado court with respect to the Rio Grande's pecuniary interest, which reads (Colo. R. 294) as follows:

> "If the Rio Grande, on its showing before the Commission and an application of the provisions of §1(4), §3(4), §15(1) and §15(3), was entitled to an order requiring the establishment and maintenance of such joint rates for the through routes which we hold had been established, then necessarily the denial of the order prayed for deprived the Rio Grande of a pecuniary gain to which it was entitled. This, because the granting of the relief undoubtedly would have resulted in a large increase of traffic via the Rio Grande and in its op-

erating income, and, no doubt, in its net earnings. More succinctly stated, if the Rio Grande, under the facts established by the evidence before the Commission, and the application of the provisions of §1(4), §3(4), §15(1) and §15(3) of the Act, was entitled to an order requiring the defendant railroads to establish such joint rates, the denial of that right resulted in pecuniary injury to the Rio Grande."

In this paragraph the court makes it clear (and this is axiomatic in any case of this character) that if a carrier bringing a complaint alleges that it is entitled under the law and the facts involved to the prescription of joint rates over existing through routes, then necessarily the denial of the appropriate statutory relief prayed for deprives the carrier of pecuniary gain, which denial it is entitled to have reviewed in a three-judge court. This is precisely the situation in the instant case.

THE GOVERNMENT'S POSITION

It should be noted that neither the United States, the Interstate Commerce Commission nor the Department of Agriculture supports the Union Pacific's contentions with respect to either of its procedural points.

SUBSTANTIVE ISSUES — COLORADO CASE

The Union Pacific opening brief in the Colorado case and the collaborating opening brief of the Washington Public Service Commission, *et al.*, contain so many erroneous statements and irrelevancies that a serious and prejudicial confusion of the issues here involved

may result unless clarification is undertaken. To help clarify and delineate the actual issues, some of the more flagrant misstatements and irrelevancies are now mentioned.

Erroneous and Irrelevant Statements in the Union Pacific Brief

1. At page 3 of its Colorado opening brief, the Union Pacific refers to the Rio Grande as a "chronically bankrupt" and "financial needs" short line railroad. Elsewhere in its brief, the Union Pacific seeks to discredit the Rio Grande as a railroad which is neither efficiently operated nor financially sound. These epithets and innuendos are untrue as shown by the undisputed testimony in the case—particularly that of Mr. Wilson McCarthy, late President of the Rio Grande, who testified at length regarding the present excellent physical and financial condition of that railroad (Consol. R., I, 42, *et seq.;* see also R. G. Consol. Op. Br. 77-79). Even Mr. P. V. Webb, a statistician on the staff of the General Auditor of the Union Pacific, testified that operating conditions on the Rio Grande compared favorably with operating conditions on the Union Pacific, and with the operating conditions on other leading transcontinental railroads (Consol. R., I, 876).

The Union Pacific's erroneous statements regarding the Rio Grande's financial stability and operating conditions are based upon conditions of many years ago, which existed not only with respect to the Rio Grande, but also with respect to the Union Pacific and many other railroads, and overlook the fact that the Union Pacific and many other presently sound and well-op-

erated railroads have passed through periods of financial distress and receivership.

In any event, these misstatements of fact are also wholly irrelevant, because so far as the question of the existence of through routes is concerned (the basic issue in the Colorado case), such statements have no bearing.

2. Again at page 3 of the Union Pacific brief, and also at pages 11, 13 and 35, the Union Pacific seeks to represent that if the Rio Grande prevails in its contentions with respect to the existence of through routes and competitive joint rates, the Union Pacific would suffer heavy financial loss and become impoverished.

First of all, this is an admission by the Union Pacific (though not intended) that there must be such great public need for Rio Grande service and such great dissatisfaction with Union Pacific service, that many shippers in the "closed door" territory would shift their freight business to the Rio Grande, thus diverting substantially all of the traffic of the Union Pacific, and seriously undermining its financial structure.

Such a statement on the part of the Union Pacific is not only a ridiculous speculation, but is completely irrelevant. The truth or falsity of the speculation has no bearing upon the actual issues in the case as to whether the Rio Grande is entitled to competitive joint rates and through routes. The financial results which may be claimed to follow compliance with or enforcement of the provisions of the Interstate Commerce Act do not

constitute a basis for the Commission or the courts to excuse violations of such statutory provisions.

3. For the purpose of making it appear that only the Rio Grande is interested in or complaining about the Union Pacific monopoly of railroad freight traffic to and from the "closed door" territory, the Union Pacific at page 12 of its Colorado opening brief makes the following misleading statement: "No complaint has ever been filed by shippers or the public or by any state public service commission demanding the longer through routes and joint rates sought by the Rio Grande." This suggests that no complaint of any kind has ever been made. Whether a formal proceeding had been brought before the Commission previous to the formal institution of proceedings by the Rio Grande is immaterial as to the issues in the instant case.

The fact is that numerous shipping organizations, flour milling companies, chambers of commerce, lumber and grain shippers and associations interested in the production of fruits and vegetables, public service commissions, and the United States Secretary of Agriculture complained either as interveners in support of the Rio Grande or testified in support of the Complaint of the Rio Grande (See the list of interveners and witnesses set forth at pages 26 and 27 of the Consolidated Opening Brief of the Rio Grande).

A very large number of additional individual witnesses also testified in support of the complaint of the Rio Grande (See Appendix F, attached to the Consolidated Opening Brief of the Rio Grande).

4. The Union Pacific asserts at various places in its

brief that the Rio Grande has no right to the traffic it is seeking. No railroad carrier has an inherent right to traffic. It is the shipper and not the carrier who determines how the traffic shall be routed. If the Rio Grande has no right to the traffic, neither has the Union Pacific, because, as is disclosed by the evidence of the shippers in the "closed door" territory, even in the face of the higher rates enforced by the Union Pacific, they route shipments over the Rio Grande (See summary of testimony of shipper witnesses, *infra* 36-39).

5. Misrepresentation and irrelevancy are also inherent in the oft-repeated, unsupported *ipse dixit* of the Union Pacific that "the order issued by the Commission grants the demand (of the Rio Grande) to the extent of about one-third of the traffic from which the Union Pacific earns over eleven million dollars annually." This is a mere self-serving speculation. No one can possibly determine or even estimate to what extent shippers in the "closed door" territory in routing their railroad freight traffic will prefer to use the through route over the Rio Grande via the Ogden gateway, instead of the through route over the Union Pacific. The exercise of any such preference will depend upon the usual factors involved in any competitive situation, largely upon the comparative excellence of treatment and service accorded respectively over the Union Pacific route and over the Rio Grande route (which route, of course, embraces the Union Pacific north of Ogden) and the economic need for service over the line of the Rio Grande. Surely, the Union Pacific with all the claims it makes as to the superiority of its service should not fear such competition. It should be borne

in mind, however, that service over the Rio Grande route, as stated by Vice-President Bradford of the Rio Grande, will depend entirely upon the service rendered by the Union Pacific north of Ogden. If it has the benefit of "on-time" performance by the Union Pacific, the Rio Grande with its established schedules will be able to render comparable service with that of the Union Pacific to many points. If, however, the Union Pacific is slow in making delivery to the Rio Grande at Ogden, the service over the Rio Grande route will be correspondingly slow (Consol. R., I, 168).

Instead of trying to speculate on the question of loss, it is more reasonable to forecast that due to the rapidly developing economic and industrial potential of the "closed door" territory, the establishment of competitive joint rates over the Rio Grande through the Ogden gateway will not reduce the tonnage being carried by the Union Pacific. This was pointed out by several responsible and experienced witnesses.

Mr. P. G. Batt, the owner of a one thousand acre farm in Idaho, engaged in raising and shipping fruits and vegetables, and other perishables, testified that in shipping to midwest and eastern markets over the Union Pacific, he has had many experiences with distressed cars, that is, with carload shipments which arrive at points where they can be reconsigned only at higher combination rates. Such points are known as "pocket markets." He testified that he did not think competitive joint rates over the Rio Grande would reduce the tonnage of the Union Pacific, but rather would open the "pocket markets" to Idaho products, increas-

ing their consumption by as much as would be diverted away from Union Pacific (Consol. R., I, 420-28).

J. E. Watson, vice-president and general manager of the J. C. Watson Company, operating a large business at Parma, Idaho, engaged in producing, packing and distributing fruits and vegetables, and shipping annually from 1500 to 2000 cars, testified that his company is constantly seeking new markets, and that the establishment of competitive joint rates via the Rio Grande would provide a freer flow of fruits and vegetables from Idaho to markets outside that State, especially in the southwest territory. This witness pointed out that because of the lack of such competitive joint rates, new markets cannot now be developed. Of course, the development of new markets would increase the total amount of freight traffic to be moved (Consol. R., I, 432-37).

Bert Higgins, a member of the Executive Committee of the Idaho State Grange, a state-wide organization consisting of 12,000 members (farmers, shippers, growers and dealers in potatoes and grain), testified that the establishment of competitive joint rates over the Rio Grande via the Ogden gateway would be to the best interest of Idaho as an agricultural state by enabling it to increase its markets (Consol. R., I, 262-69).

Many other witnesses testified that the establishment of competitive joint rates via the Rio Grande through the Ogden gateway would result in the development of new markets, and increase the tonnage of products to be shipped from the "closed door" territory.

For example, Mr. Donald L. Reed, president of the

Skyland Food Corporation, operating a frozen fruit plant at Delta, Colorado, engaged in the processing of fruits, testified that the plant has a capacity of fifteen million pounds annually, but is operated at only about fifty per cent of its capacity; that Idaho fruit is desirable, but it cannot be processed at Delta because of the lack of competitive joint rates via the Rio Grande. He stated that if such rates were available, his company could use fruits from the "closed door" territory to the extent of several thousand tons annually. Such testimony again indicates that the present situation serves to stifle the normal economic development of th "closed door" territory (Consol. R., I, 140, *et seq.*).

The nature and extent of the economic development and growth in the "closed door" territory was outlined in detail by Dr. El Roy Nelson, Director of the Bureau of Economic and Business Research of the University of Utah. Dr. Nelson testified (Consol. R., I, 177-195) that due to the availability of power from federally constructed hydro-electric projects in the area and the industries dependent upon cheap hydro-electricity, such as aluminum, chemicals, paper and products of electric furnaces, war expansion and the subsequent sales of war-built plants to private industry, the northwest area in less than a decade achieved a 30-40 year expectancy in industrial development. One of the most significant migrations in American history, according to Dr. Nelson, was the shift in population since 1940 to the northwest. During the decade 1940-1949, the population of the states of Oregon and Washington, percentage-wise, increased approximately four times as fast as did that of the nation as a whole. Idaho's pop-

ulation in that decade increased about the same percentage as did that of the nation as a whole. The unusual industrial expansion in the northwest area has resulted in increased importation of raw materials and other goods into the area, and a corresponding increase in the exportation of their agricultural products, raw materials and manufactured goods. This newly developed industrial territory needs all available rail facilities, services and routes at competitive joint rates to permit its continued and unrestricted expansion. The establishment of competitive joint rates via the Ogden gateway and the Rio Grande will have the effect of permitting a greater and unrestricted flow of traffic from and to that territory, thereby increasing the amount of railroad traffic and the need for increased railroad facilities.

Mr. J. L. Pease, a witness for the United States Department of Agriculture, supporting the application of the Rio Grande, stated that it is the position of that Department that the establishment of competitive joint rates via the Ogden gateway route of the Rio Grande will promote the increased distribution of agricultural products. This witness testified that he is a transportation specialist, and Assistant Chief of the Transportation and Warehousing Branch, Production and Marketing Administration, of the United States Department of Agriculture; also that he represented the Secretary of Agriculture, which Department of the Government had an interest in the proceedings because of two statutes—Section 201 of the Agricultural Adjustment Act of 1932, and various sections of the Agricultural Marketing Act of 1946. Mr. Pease testified

that the continued inability of shippers in the "closed door" territory to use the Ogden gateway at joint through rates is not in the interest of the general agricultural public (Consol. R., II, 1069-73); also, that the Department of Agriculture is opposed to the existing routing restrictions on agricultural commodities and is of the view that the small amount of tonnage the Union Pacific might lose, if competitive joint rates were applied through the Ogden gateway, would do no substantial harm to that carrier (Consol. R., II, 1080-81).

But again, whether the prognostications of the experienced witnesses above named are correct as to the amount of freight traffic that the Union Pacific might lose if competitive joint rates were prescribed via the Rio Grande, the estimates of the Union Pacific or others regarding this matter have no relevancy because whether the loss be great or small, or none at all, any loss that follows compliance with or enforcement of the provisions of the Interstate Commerce Act does not constitute a basis for the Commission or the courts to excuse violations of such statutory provisions.

6. The Union Pacific in its Colorado opening brief contemptuously refers to the Rio Grande as a "bridge route" to give the impression that the Rio Grande is not used or usable as a through route or a trunk-line route for transcontinental traffic generally. The Government in its brief, by an obvious *reductio ad absurdum* in the form of an exaggerated illustration at page 60, tries in its own way to convey the erroneous impression that the Rio Grande is an insignificant short line railroad.

Although traffic may be properly referred to as "bridge traffic" where a carrier performs intermediate services only, it is unlikely, if competitive joint rates were established over the through routes via the Ogden gateway and the Rio Grande, that shippers generally would use the Rio Grande merely as a "bridge route." The chief need and desire of the shippers in the "closed door" territory, as shown by their evidence, is not to use the Rio Grande as a "bridge route," in the sense that is implied by the Union Pacific and the Government, but to use it as a part of a through route from and to Colorado common points and points south and east thereof, and, of course, to avail themselves of numerous in-transit privileges on the Rio Grande (Consol. R., II, 1574-76; R. G. Consol. Op. Br. 137, App. F).

Just as the Union Pacific is in error under the evidence in the instant case in stating that the Rio Grande is a "chronically bankrupt" and "financial needs" railroad, so it is in error in stating that the Rio Grande is an insignificant "bridge route."

The Rio Grande is an essential, valuable and necessary link in transcontinental transportation, and as such, its facilities are essential to the maintenance of an adequate, and efficient and economic national transportation system. The Union Pacific, which is admittedly one of the largest railroads of the country, boasts that it has a total mileage of more than 5,000 miles in the "closed door" territory. The evidence in this case discloses that although the Rio Grande is not as large as the Union Pacific, it is nevertheless one of the large and important railroads of the country with over 2,400 miles of line, and that the improvements and replace-

ments made during the last twenty years are such that it is today one of the most up-to-date railroads in the country as to its physical lines and equipment, and one of the most efficiently operated and financially sound (Consol. R., I, 42-45, 80; R. G. Consol. Op. Br. 77-79).

The Rio Grande is not an orphan railroad and should not be so treated, or required to maintain standby through routes for the convenience of the Union Pacific and the Government, when for one reason or another they are disposed to utilize the existing through routes over its lines. Although it is true that the Rio Grande carries a substantial volume of so-called "bridge traffic," which has increased in recent years, the record likewise shows that the Rio Grande originates a large volume of traffic on its lines and is also the destination carrier for a large volume of traffic, and that in recent years, due to the increased industrial development on its lines, its services as an originating and destinating carrier have become increasingly important (Consol. R., II, 1546,1547).

7. At various places in its Colorado opening brief (pages 3, 10, 11, 13, 35, 38, 39, 77, and elsewhere) the Union Pacific undertakes to represent that the sole basis of the Rio Grande's complaint before the Commission is to enable the Rio Grande to achieve "pecuniary gain at the expense of the Union Pacific." This is another misstatement of fact.

A reference to the Rio Grande complaint will disclose that its allegations are not grounded on the idea of achieving "pecuniary gain." The complaint is in the usual form of any complaint filed before the Interstate Commerce Commission by one carrier to correct

alleged violations by another carrier (or carriers) of provisions of the Interstate Commerce Act. Any action based upon such a complaint, if successful, necessarily results in some shift of pecuniary advantage between the carriers involved. No carrier or its officials could justify themselves in the eyes of their stockholders with respect to the expense necessarily incurred in instituting and prosecuting such an action, unless as an incident thereto there is a prospect of "pecuniary gain." This is not to say that the basic purpose of such an action is to improve the carrier's financial position, or that any relief granted by the Commission is necessarily for the purpose of assisting the complainant to meet its financial needs. Every such complaint, as in the instant case, must be primarily based upon appropriate allegations of non-compliance by another carrier or carriers with provisions of the Interstate Commerce Act.

Hence, the Union Pacific's repeated reference to "pecuniary gain" on the part of the Rio Grande as a sole basis for its complaint is a distortion and a smoke screen.

There is a variety of other misstatements and irrelevancies in the Union Pacific's Colorado opening brief (others will be pointed out in connection with the Nebraska case), but those mentioned will suffice to indicate the attempt that has been made to confuse unnecessarily the real issues in the Colorado case.

Points III, IV, V and VI of the Union Pacific Colorado Opening Brief

Points III, IV, V and VI of the Union Pacific's opening brief in the Colorado case undertake to deal with substantive, as distinguished from procedural, issues. The arguments advanced under these points to some extent overlap each other and require a restatement of the substantive issues now before this Court. The Rio Grande believes that these substantive issues may be appropriately summarized as follows:

A. Whether the Colorado court was correct in holding that the Interstate Commerce Commission erred in failing to hold under the undisputed evidence that through routes are in existence as a matter of law over the Rio Grande via the Ogden gateway in connection with the Union Pacific.

B. Whether the Colorado court was correct in holding that the Commission erred in narrowly limiting itself to a consideration of the case under the restrictions of Section 15(4) of the Interstate Commerce Act, thereby imposing upon itself restrictions as to its authority to establish joint rates, which obviously prejudiced its approach to the entire proceeding.

C. Whether the Colorado court, in setting aside the Commission's Order of January 12, 1953, insofar as it denied relief to the Rio Grande, erred in remanding the case to the Commission for further proceedings in conformity with that court's opinion.

In discussing the above questions, we shall endeavor not to repeat the arguments made in the Rio Grande Consolidated Opening Brief, which relate to and in

most respects directly answer the points now argued by the Union Pacific and argued in substantially identical form in the collaborating brief of the Washington Public Service Commission, *et al.* Because of the similarity of the arguments made in the brief of the Washington Public Service Commission, *et al*,, no special reference will be made to that brief, but where occasion requires, special reference will be made in this reply brief to certain of the Government's arguments in its consolidated opening brief.

I.

The Colorado Court Correctly Held That the Commission Erred in Failing to Hold That Through Routes Are in Existence as a Matter of Law Over the Rio Grande Via the Ogden Gateway in Connection with the Union Pacific

In arguing the question of the existence of through routes over the Rio Grande via the Ogden gateway in connection with the Union Pacific, it is indicated at page 56 of its Colorado opening brief that the Union Pacific is satisfied to rely upon the Commission's views with respect to the question of the existence of through routes. An examination of the Commission's views, as quoted at page 56 of the Union Pacific brief, discloses that so far as the scope of the question of the existence of through routes is concerned, the Commission dealt with it the same as did the Colorado court, and not on the basis that the Union Pacific now suggests in its brief — the fantastic basis of whether 113,100,000 through routes are involved. No such fantastic suggestion was contemplated by either the Commission or the Colorado court. Since the appeal here is from the

decision of the Colorado court, it is important to refer to the exact language of that court to determine the scope of what it held with respect to the existence of through routes. On this question, the Colorado court said (Colo. R. 292):

> " * * * In our view, the uncontradicted evidence clearly established the existence of through routes to and from points on the Union Pacific in the northwest area and the Rio Grande via the Ogden gateway to and from Colorado common points, the Missouri River gateways and beyond. * * * "

It is to be noted that the Colorado court meticulously confined its holding to the existence of through routes "to and from points on the Union Pacific," and because of the Commission's error in this respect remanded the case to the Commission for a new look, leaving to the Commission the question of how far through routes might or might not extend to and from points on other railroads, such as the Great Northern, the Northern Pacific, and the Milwaukee, with which the Rio Grande has no physical connection.

The Union Pacific, in attempting to follow through on its fantastic theory as to the scope of the matter here to be reviewed with respect to the existence of through routes, states that there is nothing in the record to show that the through routes, admittedly in existence between the Rio Grande and the Oregon Short Line Railroad Company, and the Oregon-Washington Railroad and Navigation Company extend to shipments to and from points on the Great Northern, the Northern Pacific, and the Milwaukee. There is nothing in the record to the contrary, but this question was not decid-

ed by the Colorado court and under the decision of that court is carefully left open for consideration and determination by the Commission upon the remand.

In attempting to show that the Colorado court erred in holding that through routes to and from points on the Union Pacific exist, the Union Pacific in its brief chiefly relies upon the *Thompson* case (343 U.S. 549) and the *Beaman* case (155 I.C.C. 313), and continues to belittle the number of shipments moving over the Rio Grande to and from points in the "closed door" territory via the Ogden gateway. In view of the exceedingly large differential between the higher non-competitive combination rates and joint through rates, the wonder is that so many shipments as shown at pages 13 to 17 of the Rio Grande Consolidated Opening Brief moved on *through bills of lading* from and to points in the "closed door" territory. The attempt to show that these shipments on through bills of lading were not substantial and not sufficient to satisfy the criteria of the *Thompson* and *Beaman* cases is clearly contrary to the realities of the transportation situation here involved—where substantial actual shipments were made over the through route of the Rio Grande via the Ogden gateway. In addition to the evidence of shipments made in the typical year of 1948 to and from the "closed door" territory, and the shipments of troops and military supplies during the war period, there was undisputed evidence that from November 2, 1942, to August 17, 1945, approximately 19,000 carloads of freight traffic moved via the Union Pacific and Rio Grande through route into the "closed door" territory. These 19,000 carloads, although originally routed via the Rio

Grande and the Western Pacific or the Rio Grande and the Southern Pacific, were in fact accepted and carried by the Union Pacific as through shipments, and so delivered by it to points in the "closed door" territory.

A persistent effort is made by the Union Pacific to exclude from consideration, as of no consequence, the through shipments of troops and military supplies and the through shipments of 4,208 carloads of freight moving over the Rio Grande because of storm conditions on the Union Pacific. In the final analysis, it seems to be the theory of the Union Pacific that the through routes over the Rio Grande should be treated as *standby* through routes only. Apart from the fact that there is no such concept under the law, it would be patently unfair and inequitable to establish any such doctrine, giving the Union Pacific all the benefits and conveniences of existing through routes but none of the burdens. Either through routes are in existence, or they are not. No carrier should be allowed to say they are in existence at such times and for such purposes as suits that particular carrier's convenience; then when no such convenience is to be served, be in a position to deny that the through routes which have been so used do not exist, but that their existence is subject to being revived again whenever it suits the convenience of the particular carrier. This is simply a neat device for excluding competition.

The same situation would exist with respect to the shipments of troops and military supplies, to-wit, that, according to the Union Pacific, through routes exist when it is desired that the Rio Grande accept its share of a competitive joint rate on through shipments of

troops and military supplies, but when the Rio Grande's service is not sought, the through routes over which such troops and military supplies moved are said to no longer exist. This theory, which also seems to be advanced by the Government in its opening brief, pages 57-74, would reduce the law as to the existence of through routes to a basis of "off again, on again, gone again, Finnegan."

The Government, at several places in its consolidated opening brief, particularly pages 69-70, suggests that shipments via the Rio Grande at higher combination rates, were so routed over the Rio Grande through "the ignorance or inadvertence of shippers or originating carriers." The fact is that various shippers knowingly use the Rio Grande and knowingly pay the higher combination rates because in view of their particular needs they definitely desire to use the through routes over the Rio Grande.

For example:

Mr. Herbert P. Heidel of the Lincoln Packing Division of the American Stores, Inc., which firm is engaged in cold storage operations and in the slaughter of livestock at Pueblo, Colorado, testified that his company purchases lambs at points in Oregon and Idaho on the Union Pacific and ships them to Pueblo via Union Pacific to Ogden, thence Rio Grande, at the combination rate because the service via that route is more expeditious than via the route of the Union Pacific (Consol. R., I, 414). The testimony of Mr. Heidel was substantiated by Rio Grande witnesses Joe Fuller (Consol. R., I, 486) and Roscoe C. Rich (Consol. R., I, 512).

Mr. Donald L. Reed, President of the Skyland Food Corporation, Delta, Colorado, testified that his firm, which operates a frozen food plant at that point, processing fruits primarily, shipping to Colorado common points and east, purchased apples in the Payette, Idaho, district in 1949 and shipped them to Delta, paying the combination rate over Ogden (Consol. R., I, 142, 143).

Mr. Kenneth G. Self, majority stockholder in the Inter-Mountain Tractor Sales Corporation, distributor for Ford tractors and Dearborn farm equipment at Salt Lake City for Utah, southeastern Idaho and portions of Nevada and Wyoming, testified that his company shipped a car of machinery from the east to Idaho Falls, Idaho, via the Rio Grande to Salt Lake City, Union Pacific beyond and paid the higher combination rate (Consol. R., I, 459, 460).

Mr. D. G. Adams, Branch Manager of the J. I. Case Company, Salt Lake City, Utah, testified that his firm shipped machinery to Idaho via the Rio Grande to Salt Lake City, thence Union Pacific, paying the combination rate through Salt Lake City (Consol. R., I, 545).

Apart from instances of individual shippers who used the through route of the Rio Grande and paid the higher combination rates knowingly and not through ignorance or inadvertence, the Rio Grande through routes were not used by the Union Pacific through ignorance or inadvertence when it used the Rio Grande because of storm conditions on its own lines; neither were the through routes of the Rio Grande used by the Government for its war-time shipments due to any ignorance or inadvertence. The Rio Grande through routes were used because they were there available to

be used. Neither did the Union Pacific accept the 19,000 cars of freight traffic, above mentioned, and share in the division of the rates applied thereto because of ignorance or inadvertence.

Thompson v. United States, 343 U.S. 549, misapprehended by the Union Pacific, and misapplied by the Commission in its Report in the instant case, dealt with a situation where the Commission had erroneously assumed the existence of a through route on grain from Lenora, Kansas, to Omaha, Nebraska, because the Missouri Pacific had interchange facilities at Concordia, Kansas, with the Burlington Railroad, and because there were joint rates and through routes on grain from the origin point to points on the Burlington Railroad intermediate to but short of Omaha. In such circumstances the Commission prescribed joint rates on grain from Lenora, Kansas, a typical origin on the Missouri Pacific, to Omaha, as just and reasonable rates, without finding that through routes existed and without other findings under Sections 15(3) or (15(4) of the Interstate Commerce Act.

This Court overruled the Commission principally on two grounds: (1) that there was no evidence in the case that any grain had ever moved from Lenora, Kansas, to Omaha via the Missouri Pacific and the Burlington via Concordia, and (2) that the mere fact that the Missouri Pacific and the Burlington maintained joint rates and through routes from Lenora to points on the Burlington intermediate to but short of Omaha did not establish the existence of a through route to Omaha. It is clear that in that case the Court was not called upon to define and did not place limits upon, the power of the

Commission to establish joint rates and through routes under the provisions of Section 15(3) and Section 15(4) of the Interstate Commerce Act.

Neither the *Thompson* case nor the *Beaman* case, nor any other case undertakes to specify the number of shipments on through bills of lading necessary to show the existence of a through route. In the *Thompson* case there had been no shipment whatsoever. The language of that case must be read and interpreted in relation to that basic fact. In the *Beaman* case there had been only one shipment, which later was admitted to have been made in error. On the basis of these decisions one might well conjecture as to whether five shipments are enough, or whether ten are required, and so on; but such observations have no place in the instant case because here the shipments ran into thousands of cars, and there is no evidence in the record that the Union Pacific ever refused to issue a through bill of lading when requested to do so for through carriage to and from points on its lines via the Ogden gateway and the Rio Grande. Accordingly it is clear that neither the *Thompson* case nor the *Beaman* case is contrary to the contention of the Rio Grande in the instant case.

Under the decisions in *Virginian Ry. v. United States*, 272 U.S. 658, and *Great Northern Ry. v. United States*, 81 F.Supp. 921 (D.C. Del.), aff'd *per curiam* 336 U.S. 933, as well as under the doctrine of the *Thompson* case and the *Beaman* case, the through route shipments shown by the uncontradicted evidence in the instant case, as summarized in the opinion of the Colorado court, established the existence of through routes to and from points on the Union Pacific in the north-

west area and the Rio Grande via the Ogden gateway to and from Colorado common points, the Missouri River gateways, and beyond.

The Union Pacific in its Colorado opening brief, pages 80-81 (but not the Government in its brief) takes the position that the *Thompson* case overrules the *Virginian* case. This untenable theory advanced by the Union Pacific is analyzed and shown to be without foundation in the detailed discussion of the *Virginian* and *Thompson* cases, appearing at pages 62 and 63 of the Rio Grande Consolidated Opening Brief.

The only answer that the Commission undertook to make is shown by the Commission's own statement in its Report (Consol. R., II, 1518, 1523) to the effect that "the Ogden gateway routes are not considered as open or through routes *commercially*, but as routes that are closed to shippers because of the higher rates applicable" (Emphasis supplied). The Colorado court correctly held that the Commission's view in this regard was contrary to law. For in *St. Louis Southwestern Ry. v. United States*, 245 U.S. 136, and *Virginian Ry. v. United States*, 272 U.S. 658, this Court expressly rejected the contention that routes which are "commercially closed" as a result of higher and discriminatory combination rates are not through routes within the meaning of the Interstate Commerce Act.

When the numerous irrelevant arguments in the Union Pacific brief are screened out, its chief argument with respect to the non-existence of through routes rests on the assertion and reassertion that a cancellation of joint rates effectuates a cancellation of through routes.

That this is not the law is shown by the cases cited at pages 54, *et seq.*, of the Rio Grande Consolidated Opening Brief.

The Union Pacific has not cited a single case which holds that the cancellation of joint rates results in a cancellation of through routes. However, in order to confuse the simplicity of the legal issue involved in its position, the Union Pacific indulges in a series of speculations (U. P. Colo. Op. Br. 62-82), theorizing as to what the Colorado court had in mind in deciding that through routes are in existence to and from points on the Union Pacific in the northwest area via the Ogden gateway and the Rio Grande. These speculations are numbered 1 to 9, pages 62 to 82 of the Union Pacific brief, and constitute mere "shadow boxing." They are based on a series of *ifs* as to what the lower court had in mind, but they are not tied directly into what the lower court said as shown by its opinion.

At one point, page 67, it is asserted by reference to some unidentified brief filed before the Commission, which is not a part of the record here, that the cancellation of joint rates was so effective in closing the through routes via the Rio Grande, that the Rio Grande complained to the Commission in the aforesaid brief that the commercial deterrent of higher rates in various ways prevented the movement of traffic through the Ogden gateway via the Rio Grande. There has never been any denial anywhere at any time that the action of the Union Pacific in cancelling the joint rates constitutes a commercial deterrent. Obviously it is on that account that these proceedings were instituted before the Commission. It is a clear distortion of the Rio

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April 24, 1956

Harold B. Willey, Esquire
Clerk, Supreme Court of the United States
Washington, D.C.

Dear Sir:

This letter is written for the purpose of correcting the following error that was inadvertently made on page 44 of the Consolidated Reply Brief of The Denver and Rio Grande Western Railroad Company in the Ogden Gateway Cases, Nos. 117, 118, 119, 332, 333 and 334.

The three cases listed in the first full paragraph on page 44 of that brief are not in the sequence intended and should be put in the following order:

Lumber Rates, Oregon and Washington to Eastern Points, 29 I.C.C. 609;

The Ogden Gateway Case, 35 I.C.C. 131; and

United States v. Union Pacific R.R., 28 I.C.C. 518.

This transposition of the three cases is necessary in order to make the discussion in the three paragraphs that immediately follow them conform to what was intended by the authors of the reply brief.

A copy of this letter has been sent to all counsel of record.

Very truly yours,

FRANK E. HOLMAN
DENNIS McCARTHY
ROBERT E. QUIRK

Attorneys for
THE DENVER & RIO GRANDE
WESTERN RAILROAD COMPANY

Grande's position to say or to imply that the Rio Grande admitted or recognized that the Union Pacific had effectually cancelled the through routes by merely cancelling the joint rates.

In claiming that the cancellation of joint rates was understood by the Rio Grande as a cancellation of through routes, the Union Pacific in its brief, pages 63 to 65, cites the following early ICC cases:

> *The Ogden Gateway Case,* 35 I.C.C. 131;
>
> *Lumber Rates, Oregon and Washington to Eastern Points,* 29 I.C.C. 609; and
>
> *United States v. Union Pacific R.R.,* 28 I.C.C. 518.

The first case above cited has nothing to do with the Ogden gateway or the Rio Grande. Through routes via the Ogden gateway over the Rio Grande were not involved in that case. The action is merely an illustration of the well-known proposition that where a carrier either undertakes to cancel a through route or a joint rate, or both, the power of the Commission may be invoked to investigate and to enter an order either approving or disapproving the cancellation of joint rates and/or through routes. In no respect is the case authority for the persistent assertion of the Union Pacific that the cancellation of joint rates effectuates the cancellation of through routes.

The second case above cited involved cancellation of joint *passenger* fares and had nothing to do with *freight* traffic. Moreover, the Commission was careful to make it clear that the cancellation of the joint passen-

ger fares and the imposition of higher rates left the through routes in existence as useable through routes.

In the third case above cited, the action was brought by an auditor of the Department of the Interior (apparently without authority from any executive or superior officer of that department) seeking through routes and joint rates, with no indication of any knowledge on the part of the complainant that through routes were ever in existence or had been used via the Rio Grande and the Ogden gateway. The opinion is sketchy. The Rio Grande was neither a party to the proceeding nor was it accorded any opportunity to be heard. In fact, so far as the appearances listed in the report indicate, it was a proceeding carried on solely between the auditor of the Interior Department and the Union Pacific without the knowledge or intervention of any other interested carriers. The case has no significance so far as the issues in the instant case are concerned.

All three of the foregoing cases cited by the Union Pacific are old and outdated Commission decisions, which antedate this Court's clarifying opinions in the *Virginian* case and the *St. Louis Southwestern Ry.* case to the effect that the cancellation of joint rates does not effectuate a cancellation of through routes.

At pages 69 and 70 of its Colorado opening brief, the Union Pacific asserts that there is nothing in Section 15(8) of the Act which prevents a shipper from routing his traffic over any series of connecting railroads where physical interchange is possible and the carrier has published local rates; that the choice accorded a shipper under 15(8) is a choice between competing lines of railroad and has nothing to do with the

existence or non-existence of through routes. This is a plain distortion of the statute, and disregards the express language of Section 15(8), which is that a shipper may, where "two or more through routes and through rates shall have been established * * * designate in writing by which of such through routes such property shall be transported to destination * * * : *Provided, however,* That the shipper shall in all instances have the right to determine, where competing lines of railroad constitute portions of a through line or route, over which of said competing lines, *constituting a portion of said through line or route* his freight shall be transported." (Emphasis supplied) The Union Pacific's interpretation would permit a shipper to zig-zag his freight all over the United States and over any number of different railroads, and under the guise of transportation use railroad equipment chiefly for warehouse purposes. The plain language of the statute gives a shipper a choice of a particular route only when two or more through routes exist.

Section 15(8) confers the statutory right upon a shipper to designate the route upon delivery of his freight to the origin carrier only where "two or more through routes and through rates shall have been *established* as in this part provided to which through routes and through rates such carrier is a party * * *." It is, therefore, clear that when the origin carrier issues a bill of lading to a shipper which designates the route of the shipment, that fact is conclusive evidence that there was a choice of two or more through routes and that the route selected is an established through route, since otherwise the shipper would have no statutory right t

designate the route. In *Through Routes and Through Rates,* 12 I.C.C. 163, at page 166, which decision was cited by the Supreme Court in the *Thompson* case, 343 U.S. 549, at page 557, the Commission held that " * * * whatever other facts or incidents may serve to prove the existence of a through route, a through bill of lading is, as to the carriers recognizing it, conclusive evidence of the existence of a through route."

At pages 74 and 75 of the opening brief of the Union Pacific in the Colorado case, it criticizes the statement by the Colorado court to the effect that the Union Pacific and other participating railroads "have issued through bills of lading, thereby recognizing the through route status." That criticism is based upon the false premise that under Section 20(11) of the Interstate Commerce Act a railroad must issue a bill of lading on shipments accepted by it for through movement beyond its line, even though no through route has been established. The Union Pacific persists in misunderstanding the provisions of Section 20(11). That section provides that any common carrier, railroad, or transportation company subject to the provisions of this part *receiving property* for transportation " * * * shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof * * *."

It will thus be seen that no railroad is required to issue a bill of lading under Section 20(11) and to assume liability for loss and damage on a shipment destined to points beyond its line until and unless it receives the property from the shipper. In other words, a railroad is not required to receive property for through movement to points beyond its line unless the railroad

is a party to through routes and has published applicable rates over such routes in accordance with Section 6(1) and other sections of the Act. Section 6(1) of the Act provides that every common carrier subject to the provisions of the Act shall file with the Commission tariffs showing all rates, charges, etc., for transportation:

> " * * * between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water *when a through route and joint rate* have been established. If no joint rate over the through route has been established, *the several carriers in such through route* shall file, print and keep open to public inspection as aforesaid, the *separately* established rates, fares and charges applied to the through transportation. * * * " (Emphasis supplied)

The Union Pacific stubbornly refuses to recognize the distinction between a through route via which the combination of rates may make the route commercially non-competitive and the through route itself. These distinctions are pointedly shown in the *Virginian Ry.* case, 272 U.S. 658, 660-661, and in *United States v. Great Northern Ry.*, 343 U.S. 562, 572. It will be observed that Section 6(1) of the Act provides that if no joint rate over the through route between different carriers has been established "*the several carriers in such through route* shall file, print and keep open to public inspection as aforesaid, the *separately* established rates, fares and charges applied to the through transportation." In other words, the provisions of Section 6(1) plainly show that railroads are not even required to publish separately established rates between points on

their own line for use in connection with through traffic except where *through routes* have been established.

The Union Pacific in its brief seems to base its entire position (after dealing in numerous roundabout theories) upon the proposition that there was nothing else it could do to cancel the existing through routes via the Ogden gateway and the Rio Grande, except to cancel the joint rates and publicize that fact. It claims that this action put the world on notice that the existing through routes were also cancelled. But, however roundabout its approach, the Union Pacific is always necessarily and finally met with the decisions of this Court which definitely hold that the cancellation of joint rates does not cancel through routes. *United States v. Great Northern Ry.*, 343 U.S. 562; *Thompson v. United States*, 343 U.S. 549; *Great Northern Ry. v. United States*, 81 F.Supp. 921 (D.C. Del.), aff'd *per curiam* 336 U.S. 933; *Atchison, T. & S. F. Ry. v. United States*, 279 U.S. 768; *Virginian Ry. v. United States*, 272 U.S. 658, and *St. Louis Southwestern Ry. v. United States*, 245 U.S. 136.

It is hardly believable that the Union Pacific is not aware of how existing through routes may be effectually closed or cancelled. Clearly a through route once in existence, as again and again pointed out, is not cancelled by a mere cancellation of the joint rates that may have applied to it. It can be cancelled, however, by the carrier in question declining to issue through bills of lading over the routes which it desires to cancel as through routes. The undisputed evidence shows that the Union Pacific never took this significant step. On the contrary it has allowed the through routes to con-

tinue to exist as "standby" through routes to be used by it when its convenience and its selfish purposes so dictate, for example, to enable it to accept valuable freight traffic and participate in substantial through revenues, as it did in connection with the 19,000 carloads hereinbefore referred to which were carried at joint rates over the Rio Grande-Union Pacific through routes into the "closed door" territory.

If, when a railroad cancels joint rates over through routes, it also wishes to close the through routes, it can do so legally and factually by simply publishing in its tariffs that it will not thereafter issue a through bill of lading or accept shipments which are routed by shippers over such previously existing through routes. As above indicated, the Union Pacific failed to take this significant and essential step for effectually closing the through routes over the Rio Grande via the Ogden gateway.

Of course, when a railroad does undertake to close through routes by publishing that determination in its tariffs, and thereafter refuses to accept through shipments, any interested party may protest such action before the Interstate Commerce Commission, and upon investigation and hearing by the Commission, may obtain a ruling as to whether the railroad may close the through routes involved. This remedy is provided by Sections 15(3) and 15(7) of the Interstate Commerce Act. In a proceeding thereunder, the burden of justifying the closing of the through routes rests upon the carrier.

II.

The Error of the Commission as to the Existence of Through Routes Prejudiced the Entire Proceedings to the Injury of the Rio Grande

At pages 87, *et seq.*, of its Colorado opening brief, the Union Pacific asserts that even if the Commission erred in its failure to find that through routes existed via the Ogden gateway and the Rio Grande, and even if this is an error of law, that the error is irrelevant and in no way prejudices the Rio Grande, because no one can demonstrate that the error had any effect or influence upon the conclusion of the Commission with respect to its failure to grant the Rio Grande fuller relief. This is an astonishing assertion and requires only a brief examination to expose its fallacy.

If through routes are in existence as a matter of law as found by the Colorado court, then in considering the relief to be granted to the Rio Grande the Commission has no occasion to give any heed to the restrictive provisions of Section 15(4). Having erroneously failed to find that through routes are in existence, the Commission by this self-imposed restriction was required to determine whether the criteria of proof required by Section 15(4) were satisfied. It is almost too simple to require argument that the Rio Grande had the legal right to maintain before the Commission that through routes are in existence and if it was entitled as a matter of law to have the Commission so find, then the only question for the Commission to determine was whether the rates applicable to through routes already in existence were unjust, unreasonable, discriminatory, or prejudicial, or not in the public interest. Questions of

long haul and short haul; adequate and more efficient or more economic transportation; and preference to the originating carrier, as specified in Section 15(4) would not then have been the crucial issues before the Commission.

The Union Pacific again and again stresses the fallacy that the Rio Grande suffered no prejudice through the Commission's failure to find through routes in existence via the Ogden gateway over the Rio Grande, by suggesting that even if the case is remanded to the Commission, the Commision has already given full consideration to the Rio Grande's contentions as to its right to competitive joint rates to the same extent as if the Commission had not considered itself bound by the limitations of Section 15(4). Obviously, where a commission, or a court, or other tribunal has acted under some special statutory limitation, because it has committed an error of law in concluding that its power was limited by such a statute, there can be little doubt that its consideration of the matter was prejudiced by its own erroneous conclusion as to the necessity of limiting its power.

What the exact extent of that prejudice is cannot, of course, be accurately determined, and it need not be at this time. No one can undertake to pre-judge, and the Colorado court itself did not pretend to do so, what the nature and extent of the Commission's administrative findings will be when it considers the case free of the limitations of Section 15(4). However, apart from what the Commission may or may not do in the future as to rates, the Rio Grande is entitled to have the case remanded to the Commission so that any doubt that has

heretofore prevailed as to the existence of through routes will be adjudicated and settled. This in itself is a substantial and valuable right inhering not only in the Rio Grande, but in the shippers. It is important for the shippers to have the question settled so they may have an undisputed right to choose as between two through routes as permitted by Section 15(8). It is equally important to the Rio Grande that the shippers, both within and without the "closed door" territory, have such a right of choice. However small or large the revenue which may come to the Rio Grande from the shippers exercising such choice, there is no doubt that there will be some such revenue, as indicated by the shipments that have heretofore moved over the Rio Grande by shippers exercising their choice on the assumption that through routes exist.

The question of the existence of through routes via the Rio Grande through the Ogden gateway in connection with the Union Pacific was from the beginning the first and basic issue in the litigation. The Rio Grande as original complainant alleged the existence of such through routes (Colo. R. 6). The Commission admitted that the existence of through routes was the first issue to be decided, but never clearly decided it. The Colorado court recognized the existence of through routes as the first and basic issue, and decided it in favor of the Rio Grande as a matter of law. It goes without saying that for the Commission to fail to decide this issue, or to decide it incorrectly, and as a result operate under the highly restrictive provisions of Section 15(4) prejudiced the whole proceeding as the Colorado court held.

The Union Pacific in its brief (pages 93, *et seq.*) particularly charges the Colorado court first with "commingling and confusing" the provisions of Sections 1(4), 3(4), 15(4) and 15(3) of the Act, and later with undertaking to make administrative findings under those sections.

In quoting from the Colorado court's decision regarding these matters, the Union Pacific overlooks the fact that the quotations are from that part of the court's opinion dealing with the procedural issues raised by the Union Pacific's Motion to Dismiss, and that the court was following the normal judicial process of pointing out that *if* the allegations and contentions of the complainant were true, then the Rio Grande had standing to maintain the action as against the procedural attack. For such a purpose the allegations of a pleading are deemed to be true. The proper way to approach such a problem is to use a series of "ifs" to indicate that the court is merely hypothesizing the truth of the allegations.

An examination of the Colorado court's opinion on the merits will disclose that the court carefully refrained from invading the administrative province of the Commission, and limited its decision to two propositions of law, namely, (1) that under the undisputed evidence in the case, the Commission erred in failing to hold that through routes are in existence over the Rio Grande via the Ogden gateway in connection with the Union Pacific, and (2) that in passing on whether the defendant should be required to establish or maintain future just, reasonable, and non-discriminatory competitive joint rates, the Commission is to apply the

provisions of Sections 1(4), 3(4), 15(1) and 15(3) of the Act, free from the limitations imposed by Section 15(4).

III.

The Colorado Court Was Correct in Remanding the Case to the Commission for Further Proceedings in Conformity with the Court's Opinion

The Union Pacific in its Colorado opening brief at page 98, *et seq.*, undertakes to suggest that the District Court exceeded its power in remanding the case to the Commission for further proceedings in conformity with its opinion. An attempt is made to support the foregoing proposition—on the theory that the Colorado court in its remand undertook to make administrative findings favorable to the Rio Grande. As we have already pointed out, the Colorado court meticulously avoided invading the administrative field and remanded the case solely for the purpose of permitting the Commission to correct its error with respect to its failure to find through routes in existence, and thereafter to reconsider the case free from the limitations of Section 15(4).

In this instance, as in many others in its opening brief, tying the argument to some initial fallacy as to what the Colorado court decided, the Union Pacific then undertakes to say that since the word "remand" does not appear anywhere in the statute (28 United States Code, Section 1336), authorizing court review of Commission orders, that a court may not remand a case to the Commission for the correction of its errors of law. A mere statement of this proposition is suffi-

cient to demonstrate the absurdity of the position of the Union Pacific in this regard. Courts have never hesitated to remand cases to the Commission where, as in the instant case, it was necessary to send the case back to the Commission to correct an error of law. Thus in *Henderson v. United States*, 339 U.S. 816, this Court reviewed a judgment of a three-judge district court in connection with an Interstate Commerce Commission decision, and concluded at p. 826 as follows:

> "The judgment of the District Court is reversed and the cause is remanded to that court with directions to set aside the order of the Interstate Commerce Commission which dismissed the original complaint *and to remand the case to that Commission* for further proceedings in conformity with this opinion." (Emphasis supplied)

See also *Mitchell v. United States*, 313 U.S. 80, 97.

Finally to summarize again what has been pointed out earlier in this reply brief, both the Union Pacific brief and the brief of The Washington Public Service Commission, *et al.* confuse and complicate the actual issues before this court upon this appeal. These actual issues (leaving out the one raised with respect to the right to remand, which is palpably too fallacious to be further considered as an issue) may be restated as follows:

A. Whether the Commission erred in failing to hold that through routes are in existence as a matter of law over the Rio Grande via the Ogden gateway in connection with the Union Pacific.

B. Whether in narrowly limiting itself to a consideration of the case under the restrictions of Section

15(4) of the Interstate Commerce Act, the Commission imposed upon itself a restriction upon its authority to establish joint rates which prejudiced the entire proceeding to the injury of the Rio Grande.

Both of these issues were resolved in favor of the Rio Grande by the Colorado court. The action of the Colorado court is clearly supported by the law and by the evidence in this case.

CONCLUSION

For the reasons stated, the judgment of the United States District Court for Colorado should be affirmed and the case remanded to the Commission to proceed in conformity with the opinion of that court.

NEBRASKA DECISION

Appeals Nos. 117, 118, 119

The decision in the Nebraska case was unsatisfactory to all parties. The Denver and Rio Grande Western Railroad Company is the appellant in No. 117; the Union Pacific Railroad Company, *et al.*, and the Washington Public Service Commission, *et al.*, are appellants in No. 118; the United States of America, the Interstate Commerce Commission and the Secretary of Agriculture are appellants in No. 119. In No. 117 and No. 119, the appellants (the Rio Grande and the Government) seek a reversal of the Nebraska decision and a restoration of the Commission Order of January 12, 1953. In No. 118, the Union Pacific Railroad Company, *et al.*, and the Washington Public Service Commission, *et al.*, seek both a reversal of the Nebraska decision and

a reversal of the Commission Order. The brief of the Washington Public Service Commission, *et al.*, is largely a paraphrase of the Union Pacific brief and so nearly identical that it does not require separate attention or answer.

UNFOUNDED INFERENCES, MISSTATEMENTS AND IRRELEVANCIES IN THE NEBRASKA OPENING BRIEF OF THE UNION PACIFIC

The Union Pacific Nebraska opening brief contains so many unfounded inferences, misstatements and irrelevancies that it must be read with great caution before determining the extent to which reliance upon the factual statements therein is possible. Among the more serious of the irrelevant or erroneous statements are the following:

1. The Union Pacific erroneously states or infers (pp. 3, 17, 19 and elsewhere) that the relief granted the Rio Grande by the Commission involves an annual diversion of traffic "* * * resulting in a potential estimated revenue loss to the Union Pacific alone of more than $11,000,000 annually, * * *." This estimate is apparently based on the fantastic assumption that the Union Pacific would lose in its entirety all of the traffic covering the named commodities. No attempt has been made to explain why the allegedly adequate, efficient, shorter and cheaper (See U.P. Neb. Op. Br. 5 and numerous other places) Union Pacific will lose substantially all of its traffic to the slower, more expensive and more onerous (See U.P. Neb. Op. Br. 9 and numerous other places) Rio Grande, when the rates over the Rio Grande will be no lower than those over the Union Pa-

cific. It is, of course, ridiculous for the Union Pacific to assume or claim that it will lose all of this traffic or any substantial portion thereof with the establishment of equal rates via Ogden and the Rio Grande.

Witness Lynch of the Union Pacific admitted that the Union Pacific based its case all the way through on the assumption that it would lose all of the estimated potential traffic (Consol. R., I, 735). Witness Burns of the Union Pacific became more enthusiastic and testified that the Union Pacific would suffer a revenue loss of approximately $50,000,000 per year on such traffic (Consol. R., I, 782, 865; Consol. R., II, 1568). While the Union Pacific, as it has consistently done throughout its opening brief, gives no basis for the loss of $11,000,000 annually, it is a logical assumption that the loss was computed in a manner similar to that used by Witness Burns when he estimated the Union Pacific would suffer an annual loss of approximately $50,000,000 on the total potential.

On the other hand, Witness Hogue of the Rio Grande testified that the Rio Grande's present participation in transcontinental traffic is only about 10% of the potential and that, as a result, in his opinion the Union Pacific's estimated revenue loss of approximately $50,000,000 per year is excessive by at least 90% (Consol. R., II, 1134, 1135, 1543, 1544). Moreover, Witness Pease of the United States Department of Agriculture stated in his opinion that if the Rio Grande obtained 1,000 carloads per year "they would be doing pretty well" (Consol. R., II, 1080, 1544).

As concluded by the Commission, based upon all the

evidence presented, it is impossible to "find definitely, or to estimate with any degree of accuracy, how much traffic might be diverted to the Rio Grande if all of the rates sought were to be made applicable over that carrier, nor how much traffic will be diverted to the Rio Grande under the restricted findings herein made" (Consol. R., II, 1570).

2. The Union Pacific repeatedly and disparagingly refers to the Rio Grande as a "bridge route" because it handles "bridge traffic," which involves shipments as to which a carrier performs intermediate service only. At pages 16, 17, 18, 21, 22, 32, 33, 43-47, 75, 125, 126 and 172, and particularly at page 46 of its opening brief, the Union Pacific undertakes to claim that the handling of "bridge traffic" characterizes a railroad as a "financial needs" railroad. There are many well-known railroads in the United States which are "bridge" lines. The Union Pacific, for example, depends upon "bridge traffic" to a very great extent. It "bridges" traffic between points east of the Missouri River and Salt Lake City, in connection with the Western Pacific and between such eastern points and Ogden, in connection with the Southern Pacific, and points on its preferred connections in the "closed door" territory, as well as between various other points located on its lines and connections. Contrary to the inference of the Union Pacific, there is nothing reprehensible about "bridge traffic." The fact that the Rio Grande, one of seven available transcontinentals, now carries 10% of the annual transcontinental "bridge traffic" testifies to the public need for competitive and reasonable rates over its lines (Consol. R., I, 163).

3. Expressly at page 56 of its Nebraska Opening Brief the Union Pacific states that the Commission found " * * * that service over Union Pacific's shorter and faster routes is not only equal but greatly superior in every way to service via the Rio Grande for the through traffic concerned." This quotation is taken out of context and is therefore misleading. What the Commission actually found, after a general discussion, of which the quoted statement is only a fragment, was that "While the through service over defendants' routes, in general, is as satisfactory to the shipping public as the service which could be provided over routes including the Rio Grande, via Ogden or Salt Lake City, this is not true with respect to the commodities we have enumerated." On such traffic the Commission found that " * * * the defendants' routes are inadequate and less economical than are the Rio Grande routes" (Consol. R., II, 1574, 1575).

4. The Union Pacific in its Nebraska Opening Brief at page 3, and again, inferentially, at pages 18, 32, 96 and 115, states that the establishment of competitive joint rates via Ogden in connection with the Rio Grande " * * * would short haul Union Pacific routes 925 miles * * * ." This statement is apparently based upon the examples cited by the Commission as to the hauls from Lewiston, Idaho and Centralia and Seattle, Washington (Consol. R., II, 1538). However, where traffic is routed beyond Denver over the Union Pacific, the Union Pacific receives a further haul of 560 miles to Omaha and 640 miles to Kansas City (Consol. R., II, 1537-1538), thereby substantially reducing the Union Pacific loss in mileage. Furthermore, the hauls of the

Union Pacific of 847, 937 and 1029 miles to Ogden from Lewiston, Centralia and Seattle, respectively, are substantially longer than many of the short hauls the Union Pacific accepts to junctions with its preferred connections (Consol. R., II, 1538, 1539; see also R. G. Consol. Op. Br. 133, App. C, 171, 172, App. G). Thus the Union Pacific statement in this regard is again misleading.

5. The Union Pacific at numerous places in its brief expressly or inferentially complains that it is entitled to protect its long haul (pp. 18, 21, 30, 31, 50, 67, 143, 144, 156, 157, 174, 203), that it has done so for 75 years (pp. 8, 17, 18), that as originating carrier it has an inherent right to its long haul (pp. 14, 31, 41, 229-232) and that in-transit privileges cannot be used to deprive it of its long haul (pp. 10, 11, 37, 59, 92-96, 121, 130, 198-205). As a matter of fact, the Union Pacific has not been particularly zealous in protecting its long haul in dealing with its railroad connections other than the Rio Grande.

Appendices C and G of the Rio Grande Consolidated Opening Brief (pp. 133, 171, 172) based on Section F of Exhibit 3, by Witness Earley, and the testimony of Witness Earley (Consol. R., I, 101-11) show numerous typical examples of distances and routes over which the Union Pacific, as well as its preferred connections, take less than their respective long hauls. These appendices and the testimony of Witness Earley disclose that the Union Pacific freely joins its preferred railroad connections in competitive joint rates covering through routes that traverse the northern and southern portions of the United States, as well as in routes

which involve hauls of hundreds of miles through Canada. In other words, the Union Pacific singles out the Rio Grande, and in the exercise of its monopoly in the "closed door" territory, undertakes to prevent any traffic from moving on through routes via the Ogden gateway over the Rio Grande at anything except the higher non-competitive combination rates.

6. At pages 118 and 119 of its opening brief, the Union Pacific asserts that the Rio Grande and not the Union Pacific should be "punished" for maintaining the existing higher combination rates which were found by the Commission to be discriminatory, unreasonable and prejudicial. It was clearly understood by the Commission that the existing combination rates are the result of the discrimination, prejudice and unreasonableness practiced by the Union Pacific in favor of its own lines and those of its preferred connections, in refusing to accord the Rio Grande the same joint rate treatment as that accorded to its railroad connections other than the Rio Grande, and not the result of any wrongful act of the Rio Grande in connection with the maintenance of combination rates (Consol. R., II, 1570-1579).

It should be noted at this point that throughout its brief there is a basic confusion on the part of the Union Pacific of three entirely independent issues. First, the Rio Grande is not complaining that any of the local rates (either of the Union Pacific or the Rio Grande) are discriminatory, prejudicial or unreasonable, but that the discrimination, prejudice and unreasonableness of the practices of the Union Pacific lie in its refusal to accord joint rates, via the Ogden gateway over the Rio

Grande, to the Rio Grande and to the shippers in the "closed door" territory. The other two issues as to whether through routes are already in existence or if not, whether new through routes should be established under Sections 15(3) and 15(4), are separate issues to be resolved independently of questions of discrimination, prejudice or unreasonableness as to rates.

Unnecessary confusion has been injected into this litigation by the constant commingling of issues by the Union Pacific and the making of broadside arguments on all the issues under whatever point or points the Union Pacific undertakes to discuss the case.

7. The Union Pacific at page 118 of its opening brief argues that since neither it nor its preferred connections demand or collect rates that exceed their own joint rates for the transportation of the specified commodities, they are being improperly ordered to cease, desist and abstain from publishing demanding or collecting rates that exceed their own joint rates and that the Commission erred in requiring them to so cease, desist and abstain from doing what they are not doing.

This is but one of many examples of an attempt to distort what the Commission actually did or said. No one charges the Union Pacific with collecting a rate in excess of its own joint rates on through shipments moving over its own lines. The complaint is that it does demand and collect rates that exceed its own joint rates on through shipments via the Ogden gateway over the Rio Grande. This was the issue before the Commission which the Commission resolved by prescribing competitive joint rates. There was no issue before the Com-

mission as to wrongful conduct of the Union Pacific in the rate schedules applicable to its own lines.

8. A further obvious confusion of the issues appears in the Union Pacific brief (page 119) where it is suggested that shippers in the "closed door" territory cannot be said to be debarred from effective participation in national markets because they get better service over the lines of the Union Pacific than they could over the Rio Grande. This ignores the Commission Finding that in order to participate effectively in national markets shippers to and from the "closed door" territory need as wide-spread and as flexible through routing opportunities as possible (Consol. R., II, 1574, 1575). That Finding is based upon the undisputed evidence that shippers of the commodities specified in the Order of the Commission need to be able to "feel out" the markets along the routes of the Rio Grande, and to be able effectively to avail themselves of in-transit and reconsignment privileges along the Rio Grande. This accords with the principle of "adequate, and more efficient or more economic, transportation." It enables shippers to avail themselves of in-transit and reconsignment privileges, both along the lines of the Rio Grande and its connections as well as long the lines of the Union Pacific. Shippers who want to "feel out" markets in Rio Grande territory obviously cannot ship competitively with those desiring to "feel out" markets via the Union Pacific (see R.G. Consol. Op. Br. 137, App. F).

9. At twelve points in its opening brief (pp. 6, 10, 34, 35, 36, 55, 56, 60, 61, 107-113, 121, 130) the Union Pacific injects the idea that the Commission found that competitive joint rates were needed *solely* because the

Union Pacific does not serve Rio Grande territory, and claims that on this basis the long haul protection of Section 15(4) is in effect done away with. This is a further attempt to confuse the issues by charging the Commission with making a Finding which it never made.

10. The Union Pacific erroneously states (U.P. Neb. Op. Br. 11, 26, 35, 61, 63) that the Commission improperly based its Conclusion that relief was needed in order to provide adequate and more economic transportation upon its Finding that the proposed Rio Grande route is inadequate and also inefficient and uneconomical; whereas, what the Commission actually found was that *the conduct of the Union Pacific* in not according shippers competitive joint rates over the Rio Grande resulted in inadequate, inefficient and uneconomic transportation. This is another illustration of the repeated efforts of the Union Pacific to confuse and twist to its own purposes the actual Findings and Conclusions of the Commission.

11. Although the matter has no relevancy, the Union Pacific in its brief repeatedly states (pp. 5, 17, 18, 127, 165) that the Rio Grande has no trackage in the "closed door" territory and proposes to render no service in that territory. This is not only irrelevant but confusing. By the same token, the Union Pacific has no trackage in Illinois and in many other states, nor does it render any service in such areas. Yet, it vigorously asserts its right to the benefit of the competitive joint rates that apply between the "closed door" territory and points in Illinois and other points in the east and points in the south, where it has no lines.

12. The Union Pacific again and again in its brief makes statements, unsupported by any record reference, (see *e.g.* pp. 15-19) and other statements (see *e.g.* pp. 50, 96, 117, 230, 231) wherein it relies on various cost figures in no way supported by any underlying or particularized studies covering the respective routes involved in this litigation. The Commission clearly recognized that these cost figures, introduced and relied upon by the Union Pacific, were of little or no value because after considering them it specifically pointed out that they "were not based on studies of particular movements of traffic over the respective routes" (Consol. R., II, 1571).

13. The Union Pacific, throughout the proceedings and again in its opening brief in this Court, has undertaken to graphically indicate the alleged differentials in mileage between its routes and the Rio Grande routes by a map or chart (attached to both its opening briefs as Appendix A) showing the claimed differentials in oblongs thereon. This map is unreliable in that it does not fairly represent the differentials or comparative distances that actually exist with respect to the through routes over which Union Pacific traffic normally and ordinarily moves. The differentials, ranging from a minimum of 33 miles to a maximum of 219 miles (from which differentials the Union Pacific compiles many of its other alleged mileage differentials), are in various instances based upon routes which are not the long haul routes customarily used by the Union Pacific and actually required by the tariffs.

Specific errors of the Union Pacific's map or chart in this regard are set forth in detail in the Rio Grande's

Consolidated Opening Brief at pages 21, 22 and 23 where it is shown that the customary through route of the Union Pacific is actually longer—for example, to a point like New Orleans—than the customary through route of the Rio Grande.

Without indulging in unnecessary repetition, reference will be made here only to the last named situation at New Orleans, where the claimed differential in mileage in favor of the Union Pacific route is shown on its map as 33 miles, but where the actual differential in mileage is in favor of the Rio Grande by 35 miles.

In the case of New Orleans traffic from and to the "closed door" territory customarily moves and is required to move in most instances over the Union Pacific via its long-haul route through Kansas City, thence over connecting railroads, such as the L&A to Shreveport, Louisiana, and KCS to New Orleans, which long-haul route via the Union Pacific is 35 miles longer than the route over the Rio Grande and the latter's connections (UP-Ogden, Utah; Rio Grande-Pueblo, Colo.; C&S-Sixela, N.M.; FW&D-Ft. Worth, Tex.; T&P) to New Orleans (Consol. R., I, 132-35; Earley Exhibit 3, Sec. K, pp. 2, 3, 5-15, line 12).

14. The Union Pacific (pp. 158 to 173 of its opening brief) in dealing with what it calls "the overwhelming preponderance of evidence against the Rio Grande" makes particular point of the fact that the Union Pacific had 120 public witnesses, and at pages 167 and 168 announces the novel proposition that there is no good reason why the Commission should have accepted the testimony of the 50 witnesses supporting the Rio

Grande and not have *equally* accepted the testimony of the 120 witnesses who testified for the Union Pacific. If a commission or a court accepted *equally* the testimony for and against the factual issues in any controversy, there would be a stalemate and no decision could be rendered one way or another. Moreover, a mere superiority in the number of witnesses does not give one side the right to claim it has the preponderance of evidence. Of course the Union Pacific's witnesses testified in behalf of the Union Pacific and insisted there were no "pocket markets," and that there was no need for through routes over the Rio Grande for vegetables and perishables, etc.; but the witnesses in behalf of the Rio Grande testified to the contrary. The Commission was in the best position as a part of its administrative function to determine the intelligence, the responsibility, and the over-all credibility of the witnesses.

15. At eight different points in its Opening Brief (U.P. Neb. Op.Br. 10, 11, 37, 59, 92-96, 121, 130, 198-205) the Union Pacific argues that the Commission has no power to establish through routes or to prescribe competitive joint rates for the purpose of making in-transit privileges effective. The contention that in-transit privileges are not embraced in the statutory definition of transportation, is an unjustifiable distortion of the statutory language. Section 1(3)(a) reads in part as follows:

> "* * * The term 'transportation' as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and *all instrumentalities and facilities of shipment or carriage,* irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with

the receipt, delivery, elevation, and *transfer in transit*, ventilation, refrigeration or icing, storage, and *handling of property* transported. * * * *" (Emphasis supplied)

The language "all instrumentalities and facilities of shipment or carriage," and the language "transfer in transit," and the language "handling of property transported," sufficiently negative the contention of the Union Pacific. The Commission has frequently dealt with in-transit privileges as being a part of transportation service as defined in Section 1(3)(*a*) of the Act.

Further reference to the many other unfounded inferences, misstatements and irrelevancies in the Union Pacific Nebraska opening brief is deemed unnecessary in order to demonstrate that the statements and inferences in that brief must be approached with great caution.

SUBSTANTIVE ISSUES — NEBRASKA CASE

The Nebraska opening brief of the Union Pacific *et al.*, in No. 118 consists of 243 printed pages.* That brief presents five main points in which it is claimed the Nebraska court erred in declining to reverse the Order of the Commission *in toto*. In addition there are numerous breakdowns and sub-points which are interrelated to the five principal points. Since the issues in the Nebraska case are comprehensively stated and ar-

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* As heretofore indicated, the Nebraska Opening Brief of the Washington Public Service Commission, *et al.*, is merely a paraphrase of the points and arguments advanced by the Union Pacific in its opening brief, and therefore requires no separate answer.

gued at pages 85-115 in the Consolidated Opening Brief of the Rio Grande, an appellant in No. 117, it would not only be an imposition on this Court, but it is unnecessary to repeat these arguments here.

The following portion of the Rio Grande Consolidated Reply Brief will deal with the arguments which the Union Pacific advances in its opening brief in the Nebraska case.

I.

The Rio Grande Did Not Institute the Proceedings to Assist It in Meeting Its Financial Needs, and the Commission Properly Excluded Any Such Consideration from Its Determination of the Issues

In its first point the Union Pacific alleges that the Nebraska court erred in failing to hold that the complaint of the Rio Grande was filed with the Commission for the purpose of enabling the Rio Grande to meet its financial needs and in these circumstances the Commission was prohibited from prescribing joint rates and through routes on the commodities named in its Order via the Rio Grande and between the territories described. The prohibition relied upon by the Union Pacific is set forth in Section 15(4) of the Interstate Commerce Act, which provides:

> "No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs."

Section 15(4) must be considered in connection with Section 15(3) and other provisions of the Interstate Commerce Act, and in connection with the basic policy of the Act. The Order of the Commission assailed by

the Union Pacific in its appeal found, *inter alia* (Consol. R., II, 1578):

> "That it is necessary and desirable in the public interest, in order to provide adequate and more economic transportation, that through routes, and joint rates over such routes the same as apply over the Union Pacific and its connecting lines, defendants herein, be established via Ogden or Salt Lake City in connection with the Rio Grande [on the commodities involved] * * *."

The Commission also found that the rates assailed on the commodities and from and to the points described are and for the future will be unjust and unreasonable, and unduly prejudicial of shippers and receivers using, or desiring to use, the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes, in and to the extent that such rates exceed or may exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes. These findings were made in the Report of the Commission, 267 I.C.C. 611, at page 659 (Consol. R., II, 1579).

In its decision which prescribed joint rates and though routes on the traffic involved, the Commission said (Consol. R., II, 1529):

> "Consistently throughout the proceeding, the complainant [the Rio Grande] disclaimed any intent to prosecute the complaint for the object of assisting it in meeting its financial needs. The prohibition referred to is directed to us; not to any complaining carrier. In reaching our conclusions herein, no consideration has been given to the financial needs of the complainant. The motion [to dismiss] is overruled."

It will be observed that—

(a) the clause in Section 15(4) provides that

"No through route and joint rates * * * shall be established by the Commission for the purpose of assisting any carrier * * * to meet its financial needs."

(b) the Commission properly found that the prohibition in that clause is directed to the Commission and not to the complaining carrier, and that

(c) in reaching its conclusion no consideration was given by the Commission to the financial needs of the Rio Grande.

The argument of the Union Pacific is based upon a false premise and a misconception of the language of the clause in Section 15(4). Its argument assumes that the prohibition in the clause concerning financial needs is directed at the complaining carrier, which, as we have just indicated, is not true. Even if in the instant case the Rio Grande filed its complaint with the Commission to enable it to meet its financial needs (and it did not do so), the clause in question would not be applicable unless the Commission prescribed the relief sought on that basis.

The record shows that the Rio Grande is in a sound financial condition and that at no time has it claimed that the relief sought before the Commission was for the purpose of aiding it to meet "its financial needs." While Mr. Wilson McCarthy, the late President of the Rio Grande, admitted on the witness stand that the stockholders would naturally be interested in improving the financial condition of the Rio Grande, neither he nor anyone else stated or claimed that the financial

needs of the Rio Grande are the reasons for seeking the establishment of competitive joint rates. It is one thing to admit, as Mr. McCarthy did, that should the relief sought by the Rio Grande be granted one result would be to improve revenues of the Rio Grande and an entirely different thing to rely upon "financial needs" as the ground for the relief sought.

In its Nebraska opening brief at pages 43 and 44, the Union Pacific selected two questions out of the numerous questions asked on cross-examination and the answers made to those questions by Mr. McCarthy. The two questions and answers as quoted in the brief of the Union Pacific are:

> "Q. That is, from the standpoint of what I will say the treasury of the Rio Grande and the stockholders, that would be the purpose?
>
> A. Yes, we hope to improve our condition if we can get these through rates.
>
> Q. Insofar as the corporate management and the stockholders of the Rio Grande are concerned, that would really be the only immediate purpose to them, would it not?
>
> A. Yes—that they would want to improve the financial condition of our railroad."

The third question and answer which immediately followed the two questions quoted was omitted from the brief of the Union Pacific. That question and answer are here quoted (Consol. R., I, 48):

> "Q. Yes. That, of course, is apart from what you anticipate or what you have said would be some additional transportation conveniences that you would expect the public to derive?
>
> A. That is right."

That question and the answer by Mr. McCarthy, which the Union Pacific did not see fit to quote in its brief filed in this Court, together with the affirmative position of the Rio Grande in the proceeding before the Commission and as an intervening defendant in the Nebraska court, clearly reveal that in filing the complaint with the Commission the aim of the Rio Grande was and is to obtain equal treatment with the Union Pacific and its other connections by persuading the Commission to prescribe the same basis of competitive joint rates on traffic to and from the "closed door" territory via the Union Pacific, as apply not only via the Rio Grande through Ogden, Salt Lake City and Provo to and from California, western Oregon and Washington points and the Union Pacific, but also apply generally via transcontinental railroads between points in western territory and points in the east and southeast (Consol. R., I, 92).

If the Union Pacific is right in its contentions, no common carrier could ever seek an order from the Commission for competitive joint rates and through routes via its connecting railroads if the granting of such relief would increase the revenues or improve the financial condition of the complaining carrier. Section 13(1) of the Interstate Commerce Act specifically provides that any common carrier has the right to file a complaint with the Commission against other common carriers of anything done, or omitted to be done, by any common carrier subject to the Act in contravention of the provisions thereof. The complaint of the Rio Grande alleged that the failure and the refusal of the Union Pacific, *et al.*, to establish competitive joint

rates applicable to the traffic and between the points involved via the route of the Rio Grande through Ogden constitute violations of various provisions of the Interstate Commerce Act. In *The Chicago Junction Case*, 264 U.S. 258, at page 267, the Court after distinguishing that case from another case said that the issue before it involved:

> "* * * injury inflicted by denying to the plaintiffs equality of treatment. To such treatment *carriers* are, under the Interstate Commerce Act, as fully entitled as any shipper. *Pennsylvania Co. v. United States*, 236 U.S. 351." (Emphasis supplied)

The fact that the Order of the Commission which prescribed competitive joint rates and through routes on particular commodities may cause some loss of revenue to the Union Pacific and some increase in revenue to the Rio Grande, if the rates prescribed are established, is an incident to the exercise by the Commission of valid statutory powers. This Court has repeatedly held that the mere fact that an order of an administrative tribunal may result in loss of revenue to some of the litigants and gain to others does not constitute the taking of property contrary to the Fifth Amendment nor is it a bar to the proper exercise of the authority to prescribe rates, routes or regulations. *Baltimore & O. R. R. v. United States*, 345 U.S. 146; *American Trucking Ass'ns v. United States*, 344 U.S. 298, 322; *United States v. Berwind-White Coal Mining Co.*, 274 U.S. 564, 583, 584; *Atlantic Coast Line R. R. v. North Carolina Corp. Comm'n*, 206 U.S. 1; *Chicago, B. & Q. Ry. v. Illinois*, 200 U.S. 561; *United States v. Lynah*, 188 U.S. 445, and *Legal Tender Cases*, 12 Wall. 457, 550.

Under the "financial needs" clause of Section 15(4) and the decisions cited, the question whether the relief granted by the Commission would increase the revenues of the Rio Grande and thereby improve its financial condition is irrelevant. However, the great improvements in the physical properties of the Rio Grande, in its efficiency of operation during the last twenty years and the soundness of its financial condition are such as to brand as absurd the claim by the Union Pacific that the complaint of the Rio Grande was filed with the Commission to obtain an order to enable the Rio Grande to meet its "financial needs."

The testimony of Mr. McCarthy referred to on pages 77-79 of the Rio Grande Consolidated Opening Brief reveals that the Rio Grande acquired from the trustees on April 11, 1947 the property since operated by it (*Denver & R. G. W. R. R. Reorganization,* 267 I.C.C. 862); that during the trusteeship approximately $73,000,000 were expended to improve the property; that since the Rio Grande acquired the property on April 11, 1947, many additional millions have been expended for that purpose. These improvements include large sums for additions and betterments, the acquisition of diesel power and other modern and up-to-date equipment, the establishment of centralized traffic control, the installation of automatic signalling, new and heavier rails, improved ballast and other physical improvements. Moreover, since 1935 the main line of the Rio Grande between Ogden, Salt Lake City and Provo, Utah, and Denver, Colorado, has been substantially shortened and virtually rebuilt (Consol. R., I, 42 *et seq.*).

As the result of these improvements and the large

expenditure of money, the Rio Grande has shown proportionately greater gains in increased revenue and in the reduction of operating expenses than many other Western District Class I railroads. The Union Pacific presentation of one phase of its case to the Commission confirmed the foregoing fact (Consol. R., II, 1651, 1652). In 1949 and 1951 the operating ratio, the total maintenance ratio, and the transportation ratio of the Rio Grande were in each category lower than the same ratios of the Union Pacific (Consol. R., II, 1652). Among other things, Exhibit 28 of Witness Webb of the staff of the General Auditor of the Union Pacific shows that while Class I railroads in the Western District had an increase in operating revenues of 178.31 per cent in 1949 over 1930 and that four transcontinental lines, including the Union Pacific, had an increase of 191.62 per cent in 1949 over 1930, the Rio Grande had an increase of 220.82 per cent in 1949 over 1930 (Consol. R., I, 872-73). Mr. Webb's testimony discloses that the operating conditions on the Rio Grande are comparable with operating conditions on other leading transcontinental railroads (Consol. R., I, 876).

The Commission properly understood that the "financial needs" clause of Section 15(4) of the Interstate Commerce Act is directed to the Commission and not to a complaining carrier. It specifically held that it did not consider the "financial needs" of the Rio Grande in issuing its Order and in denying the motion of the Union Pacific to dismiss the complaint on the grounds that the complaint of the Rio Grande was filed to meet its "financial needs." Nor did the Nebraska court err in refusing to annul the Order of the Commission on the

foregoing ground as urged by the Union Pacific. In the Consolidated Opening Brief of the Rio Grande it was shown that where the Nebraska court did err was in narrowing the scope of the Order of the Commission, by cutting down the relief granted the Rio Grande by the Commission.

II.

The Nebraska Court, Insofar As It Sustained the Relief Prescribed, Correctly Reviewed the Commission Order of January 12, 1953

In its second main point the Union Pacific contends that the Nebraska court erred in failing to judge the Order of the Commission by the standards the Commission invoked and in substituting its own standards for those used by the Commission, and that the court also erred in refusing to hold that the Order of the Commission is entirely void because the Commission allegedly misconstrued and failed to observe and make the findings required by the controlling statutory standards.

On the reasons and facts stated at pages 85-115 of the Consolidated Opening Brief of the Rio Grande it was shown that the Nebraska court erred in substituting its judgment for the judgment of the Commission, in that it cut down and narrowed the decision of the Commission by assuming that it was in a better position to determine the extent of the relief that should be granted in the case than was the Commission. On the other hand, the contention of the Union Pacific that the Nebraska court erred in refusing to decide that the Order of the Commission is void in its entirety amounts to saying that the Nebraska court in all respects should have substi-

tuted its judgment for the administrative discretion and experience of the Commission.

As is shown in the Rio Grande Consolidated Opening Brief, as well as in the brief of the United States, the Interstate Commerce Commission and the Secretary of Agriculture, the Commission did not ignore or violate the standards which should be followed by an administrative agency when it decided that the competitive joint rates and through routes prescribed by it on the commodities covered are necessary and desirable in the public interest in order to provide adequate and more economic transportation; and that when it decided that the rates assailed by the Rio Grande on the commodities involved in the Order from and to the points described are and for the future will be unjust and unreasonable and unduly prejudicial of shippers and receivers using, or desiring to use, the Rio Grande routes and also unduly preferential of shippers and receivers using the Union Pacific routes, in and to the extent that such rates exceed or may exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes.

In relying upon the decisions of this Court in *SEC v. Chenery Corp.*, 332 U.S. 194, and *United States v. Carolina Freight Carriers Corp.*, 315 U.S. 475, the Union Pacific, wittingly or unwittingly, hoisted itself on its own petard. In the *Chenery* case the Court was called upon for the second time to decide the validity of an order of the Securities and Exchange Commission. In its first decision in that case, 318 U.S. 80, 87, it had held that the grounds upon which the order of the Securities

and Exchange Commission was based could not be sustained. In its second decision this Court sustained the order of that Commission and, in doing so, held, among other things, 332 U.S., at page 209:

> "The Commission's conclusion here rests squarely in that area where administrative judgments are entitled to the greatest amount of weight by appellate courts. It is the product of administrative experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the uncontested facts. It is the type of judgment which administrative agencies are best equipped to make and which justifies the use of the administrative process."

The language just quoted is equally applicable in the instant case.

In the *Carolina Freight Carriers* case, 315 U.S. 475, the Court considered the validity of an order of the Commission which, in granting "grandfather" rights to the Carolina Freight Carriers Corporation, restricted the certificate in a manner that excluded commodities which the motor carrier had held itself out to transport. The issues and the facts, as well as the law, before the Commission and before this Court in that case are clearly distinguishable from the issues, the facts and the law applicable to the case at bar.

Under Section 15(3) of the Interstate Commerce Act the Commission is given the authority to require the establishment of joint rates and through routes whenever the Commission considers that such rates and routes "are necessary or desirable in the public interest." This authority implements the duties imposed upon railroads by Section 1(4) and Section 3(4) of the

Interstate Commerce Act which require railroads to establish reasonable through routes and reasonable rates, as well as reasonable interchange facilities and arrangements, for the handling of through traffic.

Section 15(4), which places certain limitations on the power of the Commission to establish through routes, also contains six exceptions which exclude the limitations. The exceptions here pertinent are that the limitations on the power of the Commission to prescribe through routes do not apply where the Commission finds that undue prejudice, preference and discrimination exist or that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation. As shown in its Order in the instant case, the Commission found that the rates assailed in the complaint of the Rio Grande were unduly prejudicial, as well as unreasonable, and also that the rates and routes prescribed are necessary and desirable in the public interest in order to provide adequate and more economic transportation. In *D. A. Stickell & Sons, Inc. v. Alton R. R.*, 255 I.C.C. 333, 343, the Commission held that "adequate transportation" is a concept which concerns the needs of the shipping public while the phrase "more efficient or economic transportation" may well embrace the interests of both shippers and carriers. That decision was sustained by this Court in *Pennsylvania R. R. v. United States*, 323 U.S. 588, 592-593.

The Union Pacific at page 65 of its Nebraska Opening Brief (and at other pages of that brief) cites the *Pennsylvania R. R.* case (affirming the *D. A. Stickell &*

Sons decision by the Commission) as authority for the proposition that the Commission must, in considering any Section 15(4) case, find that through routes are needed for efficient *and* economic transportation as well as adequate transportation, and that the word "or" in the statute must be read as "and". Examination of these decisions discloses that neither the Commission nor the Court discussed this particular question or held that the word "or" must be construed as "and". It happened that in the *Pennsylvania R. R.* case the Commission found that through routes were needed for both "more efficient" and "more economic" transportation. But it used these words in the conjunctive only in connection with the observation (which was the real holding in the case) that any material finding under the language of Section 15(4) must, insofar as the question of *need* is concerned, be related both to the carriers and the shippers.

The language of the statute involved was not carelessly written. The history of the enactment discloses that Congress was carefully concerned with the language used as it always is where it is spelling out a provision empowering the Commission to act under what may be described as an exception to an exception. The actual language of Section 15(4)(b), which is the part of Section 15(4) here involved, applies to the establishment of through routes and not to the prescription of joint rates. It says that a through route may be established if "needed" (which obviously is equivalent to "necessary") "to provide adequate, and more efficient or more economic, transportation." This language, in view of the placement of the commas, is the same as

"adequate and more efficient transportation" or "adequate and more economic transportation."

Equally erroneous is the position of the Union Pacific under the two foregoing cases or any other cases, that Congress intended that the word "adequate" and the words "more efficient or more economic, transportation" in Section 15(4) should be restricted to a comparison between two particular railroads, to-wit, the Union Pacific and the Rio Grande. As held in the *Pennsylvania R.R.* case, 323 U.S. 588, the words of the statute are intended to be considered from the point of view of the shippers and the general public, at least as much as from the point of view of the carriers.

Nor are the words restricted to a consideration of the physical adequacy, the mechanical efficiency or the economical operation of one railroad as compared to another. Neither the dictionary nor the law defines "economic" as meaning merely "economical." It is not a question of cheapness of operation of one railroad as compared to another (Rio Grande and Union Pacific) but more a question of whether with the establishment of the new through route, the transportation would be better for the economy of the area involved and the country as a whole.

The above stated views regarding the meaning and intent of the statute are fully supported by the cases cited at page 101 of the Rio Grande Consolidated Opening Brief.

In its brief the Union Pacific cites the decision of this Court in *ICC v. Northern Pacific Ry.*, 216 U.S. 538, nine times. That decision was rendered in March 1910. At

that time the authority of the Commission to establish through routes and joint rates was conditioned upon the proviso in the Act that "No reasonable or satisfactory through route exists" (Chap. 3591, Section 4, 34 Stat. L. 589). The power of the Commission to prescribe joint rates and through routes has been enlarged since that time. In that case this Court held that the Commission had no power to make the order establishing through routes via routes other than the Northern Pacific if the route of the Northern Pacific was a reasonable and satisfactory through route. The Court sustained the lower court, which held that the route of the Northern Pacific between the points involved was a reasonable and satisfactory through route.

The standard for action in that case should be contrasted with the standard for action in Section 15(3) of the Interstate Commerce Act which now provides that the Commission may establish joint rates and through routes whenever after a hearing it finds that such rates and routes are deemed by it "to be necessary or desirable in the public interest." The Commission has held that the phrase "necessary or desirable in the public interest" does not mean that an absolute public necessity for a through route or joint rate is required and that these words "do not in either case connote indispensability." *D. A. Stickell & Sons, Inc. v. Alton R. R.*, 255 I.C.C. 333, 338.

The Commission acted within its statutory authority and upon sufficient evidence in prescribing competitive joint rates via the route of the Rio Grande through Ogden on the level of rates applicable generally on transcontinental traffic, and applicable via the Rio Grande

on traffic generally except to and from points in the states of Montana, northern Utah, Idaho, Oregon and Washington, via the Union Pacific. The fact that some of the rates have been influenced by competitive forces is of no significance. In *Hormel & Co. v. Atchison, T. & S. F. Ry.*, 263 I.C.C. 9, at page 43, the Commission said apropos of this question:

> "Defendants criticise the mountain-Pacific comparisons of complainants by labeling them depressed rates, usually truck compelled. It is noted, however, that these so-called low mountain-Pacific rates instanced by complainants apply between practically all points between which the traffic moves. They, therefore, represent the normal rate structure in that territory and afford a proper guide for determining a just and reasonable rate level for the future from the Midwest to mountain-Pacific territory."

Rate making is not an exact science. The Commission and the courts have repeatedly stated that there is no such thing as a mathematically reasonable rate or any rule of thumb for the determination of the reasonableness of a rate or rates and that the question requires the exercise of an informed and sound judgment based upon the facts in a particular case. These principles were recognized by this Court in *Atlantic Coast Line R. R. v. North Carolina Corp. Comm'n*, 206 U.S. 1, 26, where it referred to the "flexible limit of judgment which belongs to the power to fix rates," and in *Baltimore & O. R. R. v. United States*, 345 U.S. 146, *State of New York v. United States*, 331 U.S. 284, and *Georgia v. Pennsylvania R. R.*, 324 U.S. 439, 461.

III.

The Commission's Order of January 12, 1953, to the Extent That It Grants Relief, Is Amply Supported by the Findings and Conclusions of the Commission

In its third main point the Union Pacific contends that the Nebraska court erred in refusing to hold that the entire Order of the Commission is void because the basic facts found by the Commission contradict and are inconsistent with its Conclusions and therefore afford no rational or valid basis for the ultimate Conclusions and the Order.

The argument of the Union Pacific in support of its third point is rambling and fallacious. It is based largely upon false premises and upon decisions of this Court and of other courts which are not pertinent to the points discussed. It is also based upon the notion that the limitations on the power of the Commission to prescribe through routes in Section 15(4) of the Act, which are exceptions to the general policy of the Act, should dominate the viewpoint and action of the Commission. The argument made by the Union Pacific is lacking in substance.

The aim of the Interstate Commerce Act and its policy are to bring about a national system of transportation to the end that the commerce of the country may freely move between all points over available rail routes at rates that are neither unreasonable nor discriminatory as between shippers and railroads or as between connecting railroads. *Railroad Comm'n v. Chicago, B. & Q. R. R.*, 257 U.S. 563; *Borough of Edgewater,*

N.J. v. Arcade & A. R. R., 280 I.C.C. 121, 134, and *Missouri & Illinois Coal Co. v. Illinois Cent. R.R.*, 22 I.C.C. 39, 46. In the *Borough of Edgewater* case, sustained in *Baltimore & O. R.R. v. United States*, 100 F. Supp. 1002 (S.D. N.Y.), the Commission stated, 280 I.C.C., at page 123, that the provisions of Section 15(4) which recognize the right of a railroad to its long haul are subordinate to the provisions of Section 3 of the Act which, among other things, prohibit any undue or unreasonable prejudice or disadvantage. Moreover, the limitations on the power of the Commission to prescribe through routes in Section 15(4) are by the very terms of that section set aside where a Section 3 violation of the Act is found, as was the situation in the instant case.

However, the Union Pacific argues that the finding of undue prejudice and preference made by the Commission as to shippers is precluded in the absence of evidence showing that transportation conditions affecting them are substantially similar, and it argues that such a finding is also precluded by the statement of the Commission that transportation conditions on the Rio Grande are more onerous than those on the lines of the Union Pacific (Consol. R., II, 1575). The Commission found (Consol. R., II, 1575, 1576) that the differences in operating conditions and lengths of haul over the Union Pacific routes as compared with the Rio Grande routes via the Ogden gateway are substantial for hauls between the "closed door" territory, on the one hand, and points in Colorado east of and including Colorado common points, such as Denver, Pueblo, etc., Kansas (west of points on the Missouri River), Nebraska (except

Omaha), the Dakotas, Minnesota, Wisconsin, Iowa and Illinois (north of points on the route of the Union Pacific and Chicago & North Western between Omaha and Chicago) on the other hand. But the Commission also found—

> "that for hauls between points in the excluded territory and points in the United States east and south of the points and territory above described, the differences in the transportation conditions are, in general, spread over hauls of such great lengths that, considered as a whole, they become relatively insignificant. Thus, over these respective routes from and to the latter points the transportation conditions are substantially similar." (Consol. R., II, 1576)

The Union Pacific repeatedly and erroneously states, or infers in its opening brief (see e. g. pp. 5, 18, 31, 32, 96, 114) that the Commission found that routes via the Rio Grande " * * * would range from 33% to more than 50% longer than many of the Union Pacific routes * * * ." This is a misstatement of the Finding made by the Commission in this respect. The Commission stated (Consol. R., II, 1576):

> "From most of the excluded territory to western trunk-line destinations north of the route of the Union Pacific and Chicago & North Western between Omaha and Chicago, and in the Dakotas, the short routes are in connection with the Northern Pacific, Great Northern, or Milwaukee, and to such destinations the Rio Grande routes sought via Ogden are longer generally by at least 33 per cent, and range up to more than 50 per cent, than the short routes."

It will be noted that the Commission did not say that

the routes via the Rio Grande are in any instance 33% to 50% longer than the routes of the Union Pacific itself. The comparison was confined to the Rio Grande route as against the short routes in the territory north of the Omaha-Chicago line of the Union Pacific and Chicago & North Western, from and to which territory, as pointed out by the Commission, the short routes run over the Northern Pacific, Great Northern or Milwaukee.

Moreover, as shown by the Rio Grande Consolidated Opening Brief, pages 21, 22, 23, in a number of specific instances (contrary to the Union Pacific's contention), the Rio Grande through routes are actually shorter than the through routes via the Union Pacific and its connections.

It will thus be seen that the Commission made appropriate findings based upon the evidence with respect to the competitive joint rates and through routes prescribed by it which are involved in the Order of the Commission, since that Order applies only to the limited territory described in the Findings of the Commission above quoted and shown as the open territory on the map, Appendix E, of the Rio Grande Consolidated Opening Brief, at page 135. The Commission did not establish through routes or prescribe competitive joint rates on the named commodities with respect to freight traffic from and to the "closed door" territory and the areas within the cross-hatched territory shown on such Appendix E.

Moreover, in *United States v. Chicago Heights Trucking Co.*, 310 U.S. 344, the Court sustained the order

of the Commission in *Chicago & Wisconsin Points Proportional Rates,* 17 M.C.C. 573, 580. In the latter case, the Commission found that the proportional rates investigated, which were lower than the local rates, were unduly preferential of proportional rate traffic in violation of the anti-discrimination provisions of Section 216(d) of the Act despite the fact that the unchallenged evidence in that case showed that transportation conditions and the unit costs were more favorable as to traffic handled by the trucks under proportional rates than as to traffic handled by the motor carriers under local rates.

The Court recognized these differences and the arguments made with respect to them as weighty, but held that weighty as the arguments were, it found no reason to set aside the order of the Commission, despite the fact that the discrimination found to exist was based upon differences in costs, etc., which favored the services under the proportional rates of the motor carriers which were under investigation.

The Findings of the Commission in the instant case are not contradictory or inconsistent. Even if they were, that fact would not be a valid basis for enjoining the Order. This Court has said on many occasions that it is not concerned "with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it." *Virginian Ry. v. United States,* 272 U.S. 658, 665-666.

The Commission weighed the testimony of the numerous shippers who testified in support of the com-

plaint of the Rio Grande and the shippers who supported the Union Pacific, and considered the nature, the extent and the functioning of the intricate and far-flung commodity marketing system, as well as the growth of the population in the northwestern states and the development of that part of the country that has required a constantly expanding flow of diverse commodities. It found that adequate transportation facilities and services are required for the proper functioning of the marketing system, especially with respect to commodities of a perishable nature, such as food articles, fresh fruits and vegetables, frozen poultry, frozen foods, butter and eggs, ordinary livestock and dried beans. It held that the marketing and the transportation of such commodities require that as much flexibility as possible, such as the necessity of reconsignment and other in-transit privileges, be permitted in the transportation incident to the distribution process (Consol. R., II, 1574).

Consistent with the foregoing findings, the Commission made the ultimate finding (Consol. R., II, 1574, 1575) to the effect that, because of the higher combination rates and lack of effective in-transit privileges over the Rio Grande, the shippers here involved are debarred from effective participation in the national markets.

The foregoing approach is orderly and logical, and furnishes ample support for the Conclusions and Order of the Commission.

IV.

The Commission Order, Insofar As It Prescribes the Relief Sought, Is Amply Supported by the Evidence

In its fourth main point, the Union Pacific contends that the Nebraska court erred in refusing to enjoin the Order of the Commission in its entirety because it says the ultimate Findings and Conclusions of the Commission are not supported by evidence and are contrary to the preponderance of evidence.

The argument of the Union Pacific in support of its fourth point is even more confused than is its argument made in support of its third point. In dealing with point III it has already been shown that the Order of the Commission involved in the appeals from the Nebraska court is supported by substantial evidence and appropriate findings.

The Union Pacific challenges the probative weight which the Commission gave to the testimony of numerous witnesses representing shippers, chambers of commerce, livestock and other organizations of shippers whose members testified as to their respective needs for competitive joint rates via the route of the Rio Grande between the territories involved (R.G. Consol. Op. Br. 137, App. F). That challenge appears to be based upon the ridiculous charge that the Rio Grande improperly solicited these various witnesses to testify and influenced them to take part in the proceedings by improper means. The Union Pacific goes so far as to charge that the witnesses were procured and that the Rio Grande is guilty of champerty. That charge was made before the Commission in a special brief and was also made before the Nebraska court and the Colorado court.

The charge is frivolous and ridiculous. When the complaint of the Rio Grande was filed it received wide publicity and shippers, chambers of commerce, farmers, industrialists, brokers and persons engaged in various commercial activities were obviously and instantly interested in the successful outcome of the complaint which sought competitive joint rates over routes of the Rio Grande via which unreasonably higher combination rates applied. These shippers and others needed no prodding or stimulation to be urged to support the complaint. On the other hand, because of the vigorous activities and the great influence of the Union Pacific in all of the interested western states, the Rio Grande was required to spend a substantial amount of time and energy after its complaint was filed with the Commission in order adequately to deal with the numerous unjustified, misleading and prejudicial oral statements repeatedly made in the press, in speeches or in typewritten statements released to the public by a plethora of agents and representatives of the Union Pacific against the complaint of the Rio Grande, and to attempt to prepare appropriate replies to charges daily made against the complaint of the Rio Grande in the propaganda initiated and perpetuated by officers and agents of the Union Pacific.

During the hearings before the Commission, the Union Pacific did not object to the testimony of any of the witnesses who supported the complaint of the Rio Grande on the grounds now stated in its opening brief in this Court. The Union Pacific cross-examined the witnesses at great length and sought by such examina-

tion to impeach them and generally to attack their credibility. However, in that objective it utterly failed. Such cross-examination of the witnesses having proved futile, the Union Pacific has no right to challenge their credibility or their competency in this Court. *New York Cent. & H. R. R. v. ICC*, 168 Fed. 131, 138 (C.C.S.D.N.Y.); *Poole v. Poole*, 96 Kan. 84; *Stair v. McNulty*, 133 Minn. 136, and *Edwards v. Lattimer*, 183 Mo. 610.

The Commission dealt with the various contentions of the Union Pacific with respect to the alleged procurement of witnesses in the following sensible manner:

> "The record shows that both the Rio Grande and the Union Pacific sought to interest the public in the controversy and to inform other persons, especially shippers, as to the merits of their respective views. For example, the Rio Grande issued a pamphlet entitled '20 Questions' as a means of informing the public of the Rio Grande's side of the case and its reasons for seeking opening of the gateway. In its brief, the Railroad Commission of the State of Montana states that it had informal conferences with official representatives of both the complainant and the defendants before it intervened in the proceeding. A number of witnesses related that they had listened to representatives of both sides before appearing to give testimony. All witnesses were men of responsibility in their communities and were successfully engaged in their respective occupations. Many appeared and testified as representatives of large groups of producers, shippers, and receivers of freight in their areas. There is no indication that these witnesses, whether for or against the complaint, were improperly influenced, or that their respective interests in the subject matter of the controversy had been stimu-

lated in any questionable manner." (Consol. R., II, 1547)

The quoted statement of the Commission is an abbreviated paraphrase of similar findings by Hearing Examiner Mullen, who presided at all of the hearings and heard all of the witnesses and was in the best position to judge their demeanor, their truthfulness and their general credibility.

In disposing of these frivolous and specious charges made by the Union Pacific, the Nebraska court said:

> "Considerable attention has been given by the Union Pacific in its brief to the action of the Commission in rejecting a portion of evidence offered by it in an attempt to show improper conduct in the preparation and presentation of the Rio Grande's case before the Commission. We do not find justification for serious consideration of that question." (Neb. R. 165)

In *State of New York v. United States*, 331 U.S. 284, similar claims of alleged improper conduct were made before the Interstate Commerce Commission, before the lower court, and before this Court. The lower court in *State of New York v. United States*, 65 F.Supp. 856 (N.D. N.Y.), at page 874, considered the question but held in effect that it lacked substance. The attention of this Court is also invited to its decision in *Bridges v. California*, 314 U.S. 252, where the Court rejected as without substance similar unfounded charges. In that case, speaking with reference to the public's right to interest itself in judicial proceedings of general importance, and to express itself with regard thereto, this Court, at page 270 stated:

"For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions."

and at page 278 continued:

"The words of Mr. Justice Holmes, spoken in reference to very different facts, seem entirely applicable here: 'I confess that I cannot find in all this or in the evidence in the case anything that would have affected a mind of reasonable fortitude, and still less can I find there anything that obstructed the administration of justice in any sense that I possibly can give to those words.'. *Toledo Newspaper Co. v. United States, supra,* 247 U.S. 425."

V.

The Commission Properly Prescribed Relief to Correct the Preference and Prejudice Existing As Against Shippers and the Public in General

In its fifth and last main point the Union Pacific contends that the Nebraska Court erred in refusing to enjoin and annul the Order of the Commission on the ground that the Commission acted arbitrarily in prescribing competitive joint rates and through routes on the theory that "because shippers had intervened the Rio Grande's complaint became a shipper complaint."

The Union Pacific says that in its complaint the Rio Grande did not allege that the rates assailed were unduly prejudicial and preferential with respect to shippers and that the Rio Grande did not allege that through routes at competitive joint rates via its line are necessary or desirable in the public interest. Para-

graph XV of the complaint of the Rio Grande filed with the Commission reads as follows (Consol. R., I, 10):

> "That by reason of the facts stated in the foregoing paragraphs, the failure and refusal of the Union Pacific and the other defendants to establish competitive joint through rates and charges applicable to the freight traffic and between the points hereinbefore described constitutes violations by defendants of Section 1(4), Section 3, Section 15(1) and Section 15(3) of the Interstate Commerce Act, is contrary to the National Transportation Policy, and deprives the public and the complainant of the use of available and reasonable through routes at reasonable and non-discriminatory through joint rates which are necessary and desirable in the public interest."

It will be observed that contrary to the contentions of the Union Pacific the quoted paragraph from the complaint affirmatively alleges that by reason of the facts stated in the previous paragraphs of the complaint, the refusal of the Union Pacific and the other railroad defendants to establish competitive joint rates and charges, etc., constitutes violations by them of "Section 1(4), Section 3, Section 15(1) and Section 15(3) of the Interstate Commerce Act, is contrary to the National Transportation Policy, and deprives the public and the complainant of the use of available and reasonable through routes at reasonable and non-discriminatory through joint rates which are necessary and desirable in the public interest."

The contentions of the Union Pacific that the Rio Grande complaint did not contain proper allegations were made before the Commission, the Nebraska court

and the Colorado court, and were rejected by each of them. Even if the pleadings in the complaint of the Rio Grande did not recite the precise language of each of the statutes alleged to be violated, that omission would not be fatal. This Court has held that it is no more necessary to plead the exact words of a statute or the statute itself in a proceeding before the Commission than it is in a judicial proceeding. *Chicago, R. I. & P. Ry. v. United States,* 274 U.S. 29, 37.

Equally without merit is the contention that the Rio Grande has no standing to allege that its own rates were unreasonable. The Rio Grande did not allege that its own rates were unreasonable, and it is surprising that the Union Pacific would repeat in this Court such a contention, which was rejected as unsound by the lower courts and the Commission. The Rio Grande alleged that the aggregate of the through charge, made by adding together for example the local rate of the Union Pacific (from origin points to Ogden), the rate of the Rio Grande (from Ogden to Pueblo or Denver) and the rate of the Missouri Pacific, the Sante Fe, the Rock Island, and the Burlington (from Denver and Pueblo to Chicago, St. Louis, New Orleans and other destination points in the east and southeast) is unjust and unreasonable as well as unduly prejudicial as compared with the lower joint through rates maintained by the Union Pacific in connection with the other railroad defendants.

Under Section 13(1) of the Interstate Commerce Act the Rio Grande, as a common carrier, has a right to complain to the Commission of anything done in contravention of the provisions of the Act. The fact that one

link in the chain of the combination of intermediate local rates includes the local rate of the Rio Grande from Ogden to Pueblo and Denver, etc., does not deprive the Rio Grande of its statutory right to complain against the Union Pacific and the other railroad defendants, since it is their refusal to join with the Rio Grande in establishing reasonable, non-prejudicial and non-discriminatory competitive joint rates which constitutes the violation of the provisions of the Interstate Commerce Act.

The Union Pacific contends that the finding by the Commission that the rates assailed are unduly prejudicial to shippers and receivers using or desiring to use the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes, in and to the extent they exceed or may exceed the joint rates maintained on the commodities involved from and to the same points over the Union Pacific routes, should have been annulled by the Nebraska court because (it is stated) the complaint of the Rio Grande gave shippers no standing to seek such relief. This contention is without substance or merit. Section 13(1) of the Interstate Commerce Act confers a statutory right to complain upon "any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier * * * ."

Moreover, the Union Pacific overlooks the express language of Sections 15(1) and 15(3) to the effect that the Commission may prescribe relief "either in exten-

sion of any pending complaint or without any complaint whatever" whenever it finds unjust, unreasonable, discriminatory or unduly preferential or prejudicial practices and whenever "deemed by it to be necessary or desirable in the public interest." The language just quoted empowers the Commission to prescribe relief as required by the Interstate Commerce Act regardless of whether the complaint of the Rio Grande or of any shipper requests such relief.

In keeping with the language and the spirit of the law itself (Section 17(3), 49 U.S.C.) the General Rules of Practice of the Commission authorize the filing of petitions of intervention with the Commission by any person or other groups named in Section 13(1) of the Act. Numerous such persons were allowed to intervene in the action of the Rio Grande before the Commission as intervening complainants, and numerous other persons, consisting of farmers, shippers, representatives of chambers of commerce, livestock associations, and others, testified as witnesses for the Rio Grande without formal intervention. In *The Chicago Junction Case*, 264 U.S. 258, 267-269, this Court held that the Baltimore & Ohio and the other plaintiffs, in that case which involved an order of the Commission that authorized, but did not require, the New York Central to acquire control of the Chicago Junction Railroad, had standing as complainants to maintain the suit since they were intervening parties in the proceeding before the Commission out of which the order arose. The Court also said, at page 268, that the fact that interventions were allowed by the Commission

"implies a finding by the Commission that the

plaintiffs have an interest. In the proceeding before the Commission, they opposed by evidence and argument the granting of the application. This they did as of right. For under the rules of practice, adopted by the Commission pursuant to paragraph 1 of §17 of the Interstate Commerce Act, the intervener becomes a party to the proceeding, entitled, like any other party, to appear at the taking of testimony, to produce and cross-examine witnesses, and to be heard in person or by counsel."

In *Youngstown Sheet & Tube Co. v. United States*, 295 U.S. 476, 479, the plaintiffs who were interveners in a proceeding before the Commission were held to be entitled to bring and to maintain the suit to set aside the order of the Commission, since they were parties to the proceeding before the Commission, had a pecuniary interest in the rates and were adversely affected by the order. See also *ICC v. Oregon-Washington R. R. & Nav. Co.*, 288 U.S. 14, 26-28.

The general rule is that an intervener in a pending action ordinarily acquires rights and is subject to obligations equal to or as broad as those of the plaintiff or the other parties. *Gates v. Hepp*, 95 Colo. 285, 35 P.2d 857, 860; *Fitch v. United Royalty Co.*, 143 Kan. 486, 55 P.2d 409, and 67 C.J.S., *Parties* §§58-70 (1950).

Since an administrative agency such as the Commission operates under rules of procedure which are more flexible than the more technical rules that govern courts, it follows that intervening complainants before that Commission acquired the right to complain of any violation of the Interstate Commerce Act which is involved in the pleadings filed. Moreover, under Section 13(1) of the Interstate Commerce Act the Commission

is authorized to investigate complaints where there are reasonable grounds for the investigation. Therefore, every complaint before the Commission is also an investigation. In the course of such an investigation the Commission has the authority, as well as the duty, to see to it that all violations of the Interstate Commerce Act revealed by the evidence and the pleadings in the investigation shall be corrected. *Beaumont, Tex., Port Comm'n v. Beaumont, S. L. & W. Ry.*, 229 I.C.C. 119, 121, and *Eastern Interior Iowa Industrial Ass'n v. Chicago & N. W. Ry.*, 210 I.C.C. 197, 203.

VI.

General Comments

The Union Pacific contends at 34 different places in its brief that since its facilities are adequate, this precludes a finding by the Commission that through routes and competitive joint rates are needed for adequate transportation. In this connection, the Union Pacific disregards the fact that while its own lines may be adequate and its operating conditions efficient, and even less onerous than those of the Rio Grande, at the same time transportation over the Rio Grande is necessary and desirable in the public interest for an adequate national transportation system. Again, the meaning and scope of the word "adequate" in the Act is not to be tested by the adequacy of one particular railroad with reference to the territory through which its lines run only. Neither does it follow, as the Union Pacific repeatedly contends, that the availability of through routes over two competing railroads constitutes economic waste, if the route of one railroad happens to be shorter

than the other, or if a particular railroad is adequate in the sense that it is presently moving the traffic.

The Union Pacific furnishes no support in law or fact for its dogmatic statement that the relief prescribed will result in waste or be contrary to national transportation policy.

The Union Pacific persists in misinterpreting and confusing the basis upon which the Commission found that the Rio Grande routes are necessary for adequate transportation, which was that in order to accord shippers adequate transportation with respect to the national markets, the Rio Grande routes are necessary.

The Union Pacific contends that the Commission acted arbitrarily in failing to give any effect to the clause in Section 15(4) of the Act which provides

> "That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b) of this paragraph, give reasonable preference to the carrier by railroad which originates the traffic."

It will be observed that the quoted clause is not unqualified. At most, it is an admonition. It does not restrict the power of the Commission to prescribe through routes if it finds that adherence to the clause would not be consistent with the public interest; if the inclusion of controlled lines in an existing route would make the through route unreasonably long as compared with another practical through route which could otherwise be established, or if the Commission finds that the through route is needed in order to provide adequate and more efficient or more economic transportation.

Moreover, by its argument, which is tenuous, the Union Pacific desires to eat its cake and have it, too. The Union Pacific does not serve such Colorado common points as Colorado Springs, Pueblo, Trinidad and Canon City, which points are served by the Rio Grande. Any shipper served by the Rio Grande at those points who desires to make a shipment to a point on the Union Pacific north of Ogden, Utah, in the "closed door" territory must route the shipment via the Rio Grande to Denver and thence Union Pacific to destination territory in order to avoid the higher combination rates. Thus under existing practices the Rio Grande, the originating carrier, is short hauled by the Union Pacific. In these instances the Rio Grande is the originating carrier, but if a shipment should be routed Rio Grande to Ogden and thence Union Pacific to the "closed door" territory, the charges would be based upon the substantially higher combination rates. It is obvious that under the language of the clause referred to, the Rio Grande is as much entitled to its long haul from Colorado Springs, Pueblo, Trinidad and Canon City to Ogden as is the Union Pacific to Denver on shipments moving from points on its line in the "closed door" territory destined to Colorado Springs, Pueblo, Trinidad and Canon City.

The Union Pacific vigorously argues at several points in its brief to the general effect that the Commission used its powers under Sections 15(3) and 15(4) to correct violations of Sections 1 and 3 of the Interstate Commerce Act, in order to avoid the necessity of handing down an alternative decree (U.P. Neb. Op. Br. 102-104). The claim of the Union Pacific that the Order of the

Commission had to be in the alternative is based upon *Texas & Pac. Ry. v. United States*, 289 U.S. 627.

Examination of this case reveals that in footnote 39 on page 650 of that decision this Court stated that an alternative order is not required where the Commission prescribes maximum or minimum reasonable rates. In the instant case the Commission not only found that the rates assailed are unduly prejudicial to the complaining shippers desiring to use the Rio Grande but also are unreasonable. It will thus be seen that the Union Pacific has failed to appreciate the full import of the decision in the *Texas & Pacific* case and that in the light of the findings of the Commission an alternative order was not required.

Moreover, in *State of New York v. United States*, 331 U.S. 284, at pages 341 and 345 the Court clearly indicated that it is not necessary for the Commission in all cases to prescribe an alternative where discrimination is found to exist. At page 341 of its decision in the *State of New York* case, the Court said:

> "A proper finding of unlawful discrimination under § 3(1) thus enables the Commission not only to direct the carriers to eliminate the practice but also, pursuant to § 15, to prescribe the alternative."

At page 345 the Court resolved all doubt on the matter when it said:

> "Once the Commission has found rates to be 'unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial,' it is empowered to prescribe rates which are 'just and reasonable' or 'the maximum or minimum, or maximum and minimum, to be charged * * *.' §15(1)."

The Order of the Commission here involved, as has

been demonstrated, is neither indefinite nor vague. Therefore the decision of this Court in *American Express Co. v. Caldwell*, 244 U.S. 617, and the other similar decisions cited by the Union Pacific are inapplicable and beside the point.

VII.

The Order of the Commission of January 12, 1953, Should Be Affirmed and the Judgment of the Nebraska Court Should Be Reversed Insofar As It Reduced the Relief Granted to the Rio Grande by the Order of the Commission

For the reasons stated the Findings of the Commission in its Order of January 12, 1953, that through routes and competitive joint rates via the Ogden gateway over the Rio Grande, are necessary and desirable in the public interest, in order to provide adequate and more economic transportation, in order to establish just and reasonable rates, and in order to eliminate preference, prejudice and discrimination, are in accord with the purposes and requirements of the Interstate Commerce Act.

Similarly the Order of the Commission of January 12, 1953, prescribing competitive joint rates and through routes as to certain named commodities via the Ogden gateway over the Rio Grande from and to points on the Union Pacific and its preferred connections in the "closed door" territory is supported by substantial evidence.

The Nebraska court erroneously substituted its judgment for the administrative judgment of the Commis-

sion in restricting the application of the rates prescribed by the Commission to shipments consigned in the first instance to points on the Rio Grande to be accorded in transit privileges at such points and to be later shipped to points beyond the Rio Grande.

Finally, the Nebraska court erred in interpreting and applying Sections 3(1), 15(3) and 15(4) of the Interstate Commerce Act, and particularly in holding that Section 3(1) prohibiting any carrier from giving undue preference to any person, locality, etc., or subjecting any person, locality, etc., to any undue prejudice, does not apply where the persons and localities affected by the preference or prejudice are located on different railroad lines, and where, as in this case, the defendant railroads involved (the Union Pacific and its preferred connections) clearly have the power to eliminate the preference and prejudice complained of.

CONCLUSION

In conclusion, The Denver and Rio Grande Western Railroad Company respectfully submits:

That the judgment of the United States District Court for the District of Colorado in Appeals Nos. 332, 333 and 334 should be affirmed, and in accordance therewith that the case be remanded to the Interstate Commerce Commission, to proceed to a determination of the issues on the basis that through routes via the Ogden gateway are in existence, and that the case be considered and decided by the Commission free of the limitations of Section 15(4) of the Interstate Commerce Act; that the judgment of the United States District Court

for the District of Nebraska in Appeals Nos. 117, 118 and 119 should be reversed insofar as it denies the relief prayed for by the Rio Grande, that in the alternative in the event that the judgment of the United States District Court for the District of Colorado is not affirmed, this Court should reverse the judgment of the United States District Court for the District of Nebraska and affirm the Commission Order.

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April 12, 1956

APPENDIX A

ADDITIONAL STATUTES INVOLVED

Section 1336—Title 28

"Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

Section 1398—Title 28

"Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action."

Section 1(3)(a) [in part]—Title 49

" * * * The term 'transportation' as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. * * * "

Section 15(7)—Title 49

"Whenever there shall be filed with the commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once,

and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940,

the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

Section 17(3)—Title 49

"The Commission shall conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice. The Commission shall have an official seal, which shall be judicially noticed. Any member of the Commission, the Secretary of the Commission, or any member of a board may administer oaths and affirmations and any member of the Commission or the Secretary of the Commission (or any member of a board in connection with the performance of any work, business, or functions referred under this section to a board upon which he serves) may sign subpenas. A majority of the Commission, of a division, or of a board shall constitute a quorum for the transaction of business. The Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, or before any division, individual Commissioner, or board, including forms of notices and the service thereof; which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before the Commission or any division, individual Commisioner, or board and be heard in person or by attorney. Every vote and official act of the Commission, or of any division, individual Commissioner, or board, shall be entered of record, and such record shall be made public upon the request of any party interested. All hearings before the Commission, a divi-

sion, individual Commissioner, or board shall be public upon the request of any party interested. No Commissioner or employee shall participate in any hearing or proceeding in which he shall have any pecuniary interest."

Section 20(11)—Title 49

"Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory, or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to re-

cover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void: *Provided;* That if the loss, damage, or injury occurs while the property is in the custody of a carrier by water, the liability of such carrier shall be determined by the bill of lading of the carrier by water and by and under the laws and regulations applicable to transportation by water, and the liability of the initial or delivering carrier shall be the same as that of such carrier by water: *Provided, however,* That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying pasengers; second, to property, except ordinary livestock, received for transportation concerning which the carrier shall have been or shall be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as

the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section 10 of this title; and any tariff schedule which may be filed with the commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared and agreed upon; and the commission is empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term 'ordinary livestock' shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses: *Provided further,* That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided further,* That all actions brought under and by virtue of this paragraph against the delivering carrier shall be brought, and may be maintained, if in a district court of the United States, only in a district, and if in a State Court, only in a State through or into which the defendant carrier operates a line of railroad: *Provided further,* That it shall be unlawful for any such receiving or delivering common carrier to provide by rule, contract, regulation, or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice: *And provided*

further, That for the purposes of this paragraph and of paragraph (12) of this section the delivering carrier shall be construed to be the carrier performing the line-haul service nearest to the point of destination and not a carrier performing merely a switching service at the point of destination: *And provided further*, That the liability imposed by this paragraph shall also apply in the case of property reconsigned or diverted in accordance with the applicable tariffs filed as in this chapter provided."